IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Ellis B. Drew, Jr., Master-in-Equity

Case No. 2007-CP-04-2784
(Appellate Case No. 2012-213227)

Craft Construction Company, Inc. of Starr.....Respondent,

v.

Pendleton Station, LLC, Enterprise Bank of South Carolina, and Angelo Penza.....Defendants,

Of whom Enterprise Bank of South Carolina is the.....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On May 25, 2007, Respondent, Craft Construction Company, Inc. of Starr ("Craft") filed one Mechanic's Lien ("Craft Lien") against four (4) separate pieces of real property. [**R. pp. 67-72**] In the Craft Lien, Craft alleged that it was owed $101,536.36 for work that it allegedly performed on the four separate parcels. Craft also alleges that its last date of work was on March 7, 2007.

On August 31, 2007, Craft filed a Complaint against Pendleton Station, LLC – the owner of "The 2 Acre Tract" at the time ("PSL"), Enterprise Bank of South Carolina – the owner of "Tract A" and "The 38 Acre Tract" at the time (the "Bank"); Diana L. Zellner, Trustee for the Diana L. Zellner Revocable Trust UAD – the owner of "Tract B" at the time ("Zellner"); Angelo Penza; Bobby Bryant; Ursula Lesser; Roger Rowe; and

Benjamin L. Daniel. [**R. pp. 85-105**] The Complaint included the following three causes of action, each of which was made against all Defendants: (1) Breach of Contract; (2) Unjust Enrichment; and (3) Foreclosure of Mechanic's Lien. Craft specifically pled in each cause of action that it was damaged under the specific cause of action in the amount of $101,536.36.

The Bank filed its Answer denying all of Craft's claims. [**R. pp. 218-225**] The Bank alleged in defense, *inter alia*, that Craft's claims were barred because the Bank had no legal or equitable duty to pay Craft for any work alleged to have been performed by Craft, and because both the prior deed to the Bank and the Bank's prior, unsatisfied mortgage were senior to Craft's subsequent mechanic's lien as against two of the four liened properties. On November 17, 2008, the Bank filed an Amended Answer that included counterclaims of Negligence and Defamation. **[R. pp. 234-242]** Zellner, in its Answer, included counterclaims alleging that Craft trespassed onto Zellner's "Tract B" to perform the alleged work ("Zellner Answer"). **[R. pp. 226-233]**

Craft conducted no discovery in this case.

After the Bank was served with Craft's lien and lawsuit, the Bank made several good faith attempts to get Craft to dismiss the claims against the Bank and the property, all to no avail. [**R. p. 382, line 14 – p. 390, line 14**] So, the Bank served written discovery on Craft on June 3, 2008; however, Craft did not timely respond to the Bank's Interrogatories and Requests for Production. After numerous attempts by the Bank to resolve the outstanding discovery failed, the Bank filed a Motion to Compel on June 8, 2009. While that Motion to Compel was pending, the Bank served a Rule 30(b)(6), SCRCP, Notice of Deposition on Craft together with a Notice of Deposition on Craft's

principal, William "Billy" Craft. Due to Craft's failure to produce documents in response to the Bank's Requests for Production, the Craft depositions were postponed three separate times. Craft finally, after nearly two years from the first request, produced some documents in response to the Bank's written discovery – resolving the Bank's Motion to Compel. The deposition of Craft took place on February 18, 2010.

The Bank filed a Motion for Partial Summary Judgment seeking, *inter alia*, the dismissal of Craft's Breach of Contract claim against the Bank and the dismissal of Craft's Mechanic's Lien. As part of the Bank's Motion regarding the cancellation of Craft's Lien, the Bank asked for attorneys' fees and costs pursuant to S.C. Code Ann. § 29-5-20, *et seq.* That Motion was heard on September 10, 2010. By Order of the Honorable J. Cordell Maddox, Jr. ("Maddox Order"), the Bank's Motion was granted with respect to Craft's Breach of Contract claim against the Bank, and with respect to Craft's Mechanic's Lien on one of the four liened properties- "The 38 Acre Tract". [**R. pp. 53-60**] Judge Maddox did not rule on the Bank's request for attorneys' fees and costs. So, prior to the case being tried, the Bank filed a Motion for an Award of Attorneys' Fees and Costs ("Atty Fee Motion") on October 5, 2011. [**R. pp. 344-360**]

Due to the factual similarities between Craft's lawsuit and the separate lawsuits filed by two other contractors on the same Project[1], the lower court tried all three (3) cases at the same time.[2] [**R. p. 382, lines 1-7**] However, none of the three lawsuits (or any of the three separate mechanic's liens at issue in each) were ever consolidated pursuant to S.C. Code Ann. § 29-5-170, or otherwise. **[R. p. 614, line 24 – p. 615, line 17; pp. 8, 14]**

[1] Miller Construction Company, Inc. ("Miller") and Moorhead Construction, Inc. ("Moorhead")

[2] The date certain trial of this case was originally scheduled to begin on October 26, 2011 in the Anderson County Court of Common Pleas. However, after arriving for trial on said date, the court made it clear to counsel that the court would prefer the Master-In-Equity, Honorable Ellis B. Drew, Jr., hear the case. Despite the further delay (the case then being over four (4) years old at that point), the case was referred by Order of Reference to Judge Drew who subsequently set the trial in his court for December 8, 2011.

Prior to taking testimony at trial, the lower court heard the Bank's previously filed Motion for an Award of its Attorneys' Fees and Costs.[3] **[R. p. 383, line 17 – p. 385, line 21]** The lower court withheld from ruling on the Motion until the resolution of Craft's lien claim against the remaining three liened properties.

At the close of Craft's case, the Bank moved for directed verdict as to Craft's two remaining causes of action against the Bank – Foreclosure of Mechanic's Lien and Unjust Enrichment. **[R. p. 516, line 13 – p. 521, line 5]** The lower court denied the Bank's Motion after Craft argued that there was sufficient evidence entered into the record to support Craft's claims.

At the close of the Bank's case, after brief reply testimony, and after brief questioning by the lower court, the lower court immediately ruled on Craft's claims. **[R. p. 582, line 25 – p. 583, line 20]** The lower court concluded, after the lower court made clear on the record that it thought Craft's claim was "a little problematical", that of the $85,499.67 total that Craft was seeking at trial under its (unamended $101,536.36) lien claim, Craft was owed "sort of a round number ... of $70,000.00" and pre-judgment interest **[Id.]** The lower court ordered the record remain open pending a subsequent hearing before it on the S.C. Code Ann. § 29-5-20, *et seq.* "prevailing party" issue. **[R. p. 584, lines 2-11]**

A subsequent hearing was scheduled for January 24, 2012. **[R. pp. 588-592]** At the hearing, the lower court immediately concluded that Craft was the "prevailing party" in accordance with S.C. Code Ann. § 29-5-20, *et seq.* **[R. p. 613, line 12 – p. 614, line**

[3] Also pre-trial, Craft agreed to voluntarily dismiss Defendants Zellner, Bobby Bryant, Ursula Lesser, Roger Rowe and Benjamin L. Daniel. The lower court subsequently signed a Pre-trial Order Regarding Dismissal of Certain Parties ("Pre-trial Order"). **[R. p. 4]** This left only the Bank, PSL and Angelo Penza as Defendants – with claims against only the former two.

11] The lower court decided, *sua sponte*, at the hearing that Craft should be awarded attorneys' fees in the amount of $32,000.00 plus costs without any request for such amount from Craft and without taking any testimony or reviewing any documentation as to the actual amounts incurred. **[R. pp. 588-618]** Prior to concluding the hearing, the lower court made clear on the record that its comments on the record in this case regarding the merger doctrine should be considered "dictum" because that issue was not before it and it "[didn't] need to hear anything about it." **[R. p. 599, line 14 – p. 605, line 10]** At the conclusion of the hearing, the lower court requested that Craft's counsel propose an order and share same with the Bank. Over the Bank's objection, the lower court subsequently signed the 'Final Order and Judgment' ("Craft Order") exactly in the form proposed by Craft. **[R. pp. 5-19]** The Craft Order was signed and filed on June 7, 2012. The Bank received the Craft Order on June 13, 2012.[4]

In the Craft Order, the lower court awarded Craft a personal, money judgment against the Bank under Craft's Mechanic's Lien Foreclosure claim in the amount of $130,354.16.**[Id., R. p. 16]** This amount is apparently representative of the $70,000.00 "round number" amount plus $27,562.50 in pre-judgment interest, $32,000.00 in attorneys' fees, and $791.66 in costs.**[Id., R. pp. 14-16]** Also in the Craft Order, the lower court awarded the foreclosure of Craft's Mechanic's Lien finding the total lien amount to be the same $130,354.16.**[Id, R. p. 16]** The lower court did not award Craft any damages for either its Breach of Contract claim or its Unjust Enrichment claim against any party. **[R. pp. 5-19]** The lower court also ruled that despite one of the liened properties being previously deeded in lieu of foreclosure to the Bank, the deed to the

[4] The lower court signed separate orders for each of the other two separate lawsuits that were tried together with Craft's lawsuit.

Bank was *junior* in priority to the subsequently filed Craft Mechanic's Lien. **[R. pp. 10-13, 16017]** The lower court also ruled in its order that the doctrine of merger applied when the Deed in Lieu of Foreclosure was filed such that the August 2005, unsatisfied mortgage from PSL to the Bank on the same property should be deemed satisfied. **[Id.]** In so ruling, the lower court concluded that Craft's May 2007 Mechanic's Lien was superior in priority to the Bank's August 2005 Mortgage on, and March 2007 Deed to, the subject property.

The Bank served its Motion to Reconsider pursuant to Rule 59(e), SCRCP, on June 22, 2012. **[R. pp. 372-376]** At a hearing on August 21, 2012, the lower court immediately denied the Bank's Motion to Reconsider whereby the lower court requested that Craft again supply a proposed order to be shared with the Bank. **[R. p. 636, line 16 – p. 637, line 2]** The Bank received the proposed order and immediately objected to the form order and requested a reasoned order. Over the Bank's objection, the lower court signed the proposed order exactly in the form proposed by Craft. **[R. pp. 1-3]** On October 5, 2012, the Bank received written notice of entry of the lower court's October 4, 2012 Order denying the Bank's Motion to Reconsider. On October 11, 2012, the Bank filed its Notice of Appeal as to the lower court's June 7, 2012 Order and as to the lower court's October 4, 2012 Order. Craft did not file an appeal.

STATEMENT OF FACTS

The underlying lawsuit centers on Respondent Craft's alleged construction work as a subcontractor on a failed mixed-use development project known as Pendleton Station, located in the Town of Pendleton within Anderson County, South Carolina. **[R. p. 55]** The developer of the Pendleton Station project was Defendant PSL. The primary owners and operators of PSL are the family of (former Defendant) Benjamin L. Daniel, Sr. out of Charleston, South Carolina.

Although there were several phases planned for the Pendleton Station project, the initial phase is the only phase in which construction occurred and thus, is the only phase at issue in the underlying lawsuit.**[R. p. 55]** The initial phase of the Pendleton Station project (the "Project") was to be performed over the following three contiguous tracts of property: (1) a two acre tract commonly referred to as "The 2 Acre Tract", which is the western-most property at issue; (2) on the eastern border of The 2 Acre Tract was a thirty-one acre tract commonly referred to as "Tract A"; and (3) on the eastern border of Tract A was another, almost identically shaped thirty-one acre tract commonly referred to as "Tract B". **[R. p. 55; p. 257]**

In August 2005, the Appellant Bank entered into a development loan agreement with PSL. **[R. pp. 55-56]** This loan agreement involved the Bank loaning PSL monies via line-of-credit in the amount of $3 Million for PSL's horizontal development (site work) of the Project (the "Development Loan")[5]. **[R. pp. 689-691]** In exchange, the Bank received, *inter alia*, a promissory note (the "Promissory Note") from PSL stating the

[5] The Development Loan money was to be used by PSL to pay for, *inter alia*, the construction completed by Moorhead and Craft under Moorhead's contract with PSL. **[R. pp. 677-691; pp. 244-246]**

Bank was to receive a first mortgage on the 64 acres comprising the three aforementioned properties where the horizontal development was to take place. **[R. pp. 677-688]**

Moorhead contracted with developer PSL to be the general contractor for the horizontal construction on the Project. **[R. pp. 643-647]** Moorhead obtained a payment bond for the purpose of securing payment to any subcontractors that Moorhead may hire on the Project. (the "Payment Bond") **[R. p. 500, line 15 – p. 501, line 2]** Moorhead, in-turn, entered into subcontracts with Miller and Respondent Craft to perform portions of this work on the Project. **[R. p. 436, lines 7-12]**

After the Bank entered into the Development Loan agreement with PSL and while the horizontal construction was underway, the Bank in the fall of 2005 began entering into (vertical) construction loan agreements with individual fee simple owners of the fifty-eight townhome units that were to be constructed as part of the Project (the "Construction Loans"). **[R. pp. 244-246]** This vertical construction did not commence until January 2006.

In December 2005, while Moorhead's work on the horizontal construction was still underway and prior to the vertical construction beginning, PSL provided the Bank with, *inter alia*, a first mortgage on an additional 38 acre tract ("The 38 Acre Tract") as further security for the Development Loan.[6] **[R. p. 56]** The Bank then agreed to increase the Development Loan to PSL to $5.5 Million. **[R. p. 534, lines 6-15; p. 245]** In exchange, PSL agreed to, *inter alia*, have the Project completed by January 2007.

In late February 2007, the Bank notified PSL that PSL was in default of its obligations to the Bank under the Development Loan, to include, without limitation, the

[6] The 38 Acre Tract is contiguous to the northern boundaries of both Tract A and Tract B. The (unimproved) 38 Acre Tract was purchased by PSL for its intended use in later phases of the development-phases that did not materialize. **[R. p. 55; p. 257]**

obligations to complete the Project in a timely manner and to make timely payments to the Bank. **[R. p. 534, lines 6-15; pp. 692-693]** PSL deeded the Project to the Bank in lieu of foreclosure on March 5, 2007 (the "Deed in Lieu").[7] **[R. pp. 694-697; pp. 133-134]** The Deed in Lieu transferred only Tract A and The 38 Acre Tract less the units previously sold to the individual unit owners in fee simple.

Upon the Bank's receipt of the Deed in Lieu, the Construction Loan agreements were still in place between the Bank and the fee simple owners of the 58 townhome units. **[R. p. 539, line 21 – p. 540, line 13]** So, the Bank undertook an intensive investigation as to, *inter alia*, the condition and value of the work completed by PSL on the vertical construction and as to the status of PSL's obligations to the individual unit owners. **[R. p. 536, lines 4-11]** In an effort to expedite this process and to obtain the information it needed to make the most informed decisions, the Bank decided to hire Charlie Kernaghan.[8] **[R. p. 391, lines 1-23]**

As soon as the Bank started its investigation with the help of Kernaghan, the Bank learned that several contractors were owed money for the work they performed on the vertical construction.**[R. p. 408, lines 15-22]** Despite questions regarding liability for these debts (and prior to seeking legal counsel), the Bank immediately paid these contractors in an effort to avoid liens/lawsuits being filed against each of the 58 units/unit-owners. Over the course of the following weeks, growing questions and

[7] At the time, the $5.5 Million Development Loan was outstanding in full. As discussed below, the Deed in Lieu was transferred with the understanding that PSL was still liable for any deficiency representative of the outstanding debt minus the value of the property that PSL was deeding in lieu of foreclosure.

[8] Kernaghan was a former employee of PSL who was working on the Project for PSL (as the latest construction manager for PSL) up until the Deed in Lieu was filed. **[R. p. 390, lines 1-25]** The Bank hired Kernaghan because it was undisputed then, and remains so today, that Kernaghan was never involved with the ownership or operation of PSL, was not a member of the much maligned Daniel family (owners of PSL), was never under suspicion for the myriad of claims pending against the Daniels, and he knew a great deal about the actual status of construction on the Project. **[R. p. 391, lines 20-23]** It was also beneficial to the Bank that Kernaghan could remain on-site on a daily basis since he lived nearby.

concerns arose regarding PSL's use of the loan proceeds and the material representations that PSL and its affiliates had made to the Bank, the individual unit-owners, the Town of Pendleton, and others.**[R. p. 536, line 4 – p. 537, line 11]** Through its investigation during the weeks following the Deed in Lieu, the Bank discovered that PSL and PSL's attorney had not mortgaged The 2 Acre Tract or Tract B to the Bank as agreed in, among other things, the Promissory Note. **[R. p. 547, line 16 – p. 547, line 2]** The Bank also began to uncover the magnitude of both PSL's misappropriation of Development Loan funds and PSL's material misrepresentations. **[R. p. 536, line 4 – p. 537, line 11]** At this same time, it became clear to the Bank that PSL could not obtain the alternative financing that it had promised the Bank it would obtain in order to pay the remaining debt it owed the Bank. **[R. p. 538, lines 12-15]** So, on May 11, 2007, the Bank filed suit against PSL and its related individuals and entities (the "Bank Lawsuit"). **[R. p. 122]**

The Bank Lawsuit included claims against PSL and its principals for, among a litany of other claims, the deficiency still owing on the Development Loan. **[R. pp. 134-137]** The subsequently filed "Amended Bank Lawsuit" alleged that PSL failed to mortgage Tract B and The 2 Acre Tract as security for the Development Loan in accordance with the terms of the Promissory Note.[9] **[R. pp. 202-204]** As soon as PSL filed its Answer to the Bank Lawsuit in July 2007, PSL quitclaimed The 2 Acre Tract to the Bank ("Quitclaim Deed") pursuant to the understanding (outlined below) between PSL and the Bank regarding a credit against the still outstanding deficiency. **[R. pp. 777-780]** Notably, the Bank never satisfied the August 2005 Mortgage to the Bank from PSL, which was filed against Tract A and The 38 Acre Tract to secure the Development Loan.

[9] The Bank Lawsuit was one of at least fourteen (14) different lawsuits filed in conjunction with this failed development.

After lengthy negotiations, the Bank was deeded each of the 58 individual units, mostly in lieu of foreclosure. **[R. p. 539, line 21 – p. 540, line 18]** Zellner deeded Tract B to the Bank ("Zellner Deed") in February 2008. **[R. pp. 781-785]** In late August 2007, the Bank hired another contractor after it made the decision to complete the Project in hopes of recouping some of its damages.[10] **[R. p. 538, line 16 – p. 539, line 4]**

On August 31, 2007, Craft filed the underlying lawsuit. **[R. pp. 85-105]** Strikingly, Craft made no claim against Moorhead in its Complaint, as Craft did not even name Moorhead as a defendant. Of equal significance, Craft never filed a bond claim against Moorhead's Payment Bond for the amount Craft claims it is due for the work it allegedly performed under its contract with Moorhead. **[R. p. 445, line 17 – p. 446, line 2; p. 500, lines 15-23]**

ARGUMENT

I. DID THE LOWER COURT ERR IN FINDING THE APPELLANT *PERSONALLY* LIABLE UNDER THE RESPONDENT'S MECHANIC'S LIEN CLAIM?

According to the lower court's Craft Order, the only cause of action upon which Craft prevailed (against any Defendant) was its mechanic's lien foreclosure claim. **[R. pp. 5-19]** However, in the lower court's Order, the lower court appears to have entered a personal judgment against the Bank in the amount of $130,354.16. **[R. p. 16]**

A mechanic's lien foreclosure claim is not *in personam*; therefore, there is no basis in law for a personal judgment to have been entered against the Bank. Ad. Coast Lumber Corp. v. Morrison, 152 S.C. 305, 309-10, 149 S.E. 243, 245 (1929)("[I]n a proceeding strictly to enforce a mechanic's lien, the petitioner may not recover a

[10] Unfortunately, this decision came just before the real estate collapse of late 2007, which- together with Craft's *lis pendens* being of record for close to six (6) years now (preventing the Bank from selling the finished Project for market value) - has led to further losses to the Bank.

personal judgment against the owner of the property or such judgment for any deficiency that may result from its sale."). While a party asserting a mechanic's lien is not precluded from seeking damages for breach of contract in conjunction with, or as an alternative to the mechanic's lien, a statutory mechanic's lien action should not be confused with, and is not a vehicle for, the collection of damages for breach of contract.[11] Sea Pines Co. v. Kiawah Island Co., 268 S.C. 153, 232 S.E.2d 501 (1977).

Further, a party such as the Bank should not be made to bear a loss that rightfully belongs to another. Unison Ins. Co. v. Hertz Rental Corp., 312 S.C. 549, 436 S.E.2d 182 (Ct.App. 1993). Likewise, Craft, in seeking equity, must do equity. Whetstone v. Whetstone, 309 S.C. 227, 420 S.E.2d 877 (Ct.App. 1992). *The testimony of Craft at trial* makes clear that Moorhead is who Craft worked for on the Project, and with whom Craft had contracted for such work on the Project, and *the party who owes Craft for that work on the Project – not the Bank.* **[R. p. 500, lines 15-18]** Craft also testified regarding the damages he was owed due to the failure of Moorhead to pay the invoices that Craft had submitted for the work Craft alleged to have completed. **[R. p. 497, lines 2-24]** Moreover, Craft testified that it did not have a contract with the Bank. **[R. p. 499, lines 21-24]** Further, Craft testified that Craft did not know that the Bank was involved as the lender on the Project until after the Deed in Lieu, that Craft had no conversation with anybody at the Bank prior to the Deed in Lieu, that Craft never notified the Bank that it was not paid on the Project, that Craft never notified PSL that it was not paid on the Project, and that Craft didn't have any idea who the Bank was throughout the entire time

[11] Mechanic's liens are purely of statutory origin, and can be acquired and enforced only in accordance with the strict terms and conditions of the specific statute creating them. Williams v. Vanvolkenburg, 312 S.C. 373, 440 S.E.2d 408 (Ct. App. 1994). Mechanic's lien protection does not extend to those persons who are not within the protected class identified in the statutes. Guignard Brick Works v. Gantt, 251 S.C. 29, 159 S.E.2d 850 (1968).

Craft did work on the project. **[R. p. 501, lines 3-22]** Further still, not only did Craft not file a claim against Moorhead's Payment Bond[12] (which would have guaranteed Craft payment without the unnecessary incurrence of interest and attorney's fees), Craft did not file a claim against Moorhead in its lawsuit or even name Moorhead as a defendant in the lawsuit. **[R. pp. 85-105]**

The actions of Craft here[13] are comparable to what transpired in the cases of Glidden Coatings & Resins, Div. of SCM Corp. v. Suitt Const. Co., Inc., 290 S.C. 240, 349 S.E.2d 89 (Ct.App. 1986), and City Lumber Co. v. National Surety Corp., 229 S.C. 115, 92 S.E.2d 128 (1956). In those cases, a joint check was issued to a subcontractor and the subcontractor's materialman for work completed on a project. Both joint payees endorsed the check, but the materialman allowed the subcontractor to retain funds out of the check representative of the debt still owing the materialman, rather than requiring the subcontractor to pay the materialman in full out of the check proceeds. The South Carolina Court of Appeals in Glidden and the Supreme Court in City Lumber held that the action of the materialman in endorsing the joint check without collecting the past due amount from the subcontractor out of the same check released the innocent general contractor and its surety from liability for such indebtedness. Id. In each case, the Court viewed this result as following from two well recognized rules of law:

> (1) when a creditor has in his hands the means of satisfying his debt out of the property of his principal debtor, and does not use it, but gives it up, the surety on the debt is discharged; and (2) where one of two innocent parties

[12] Prior to filing its May 25, 2007 mechanic's lien, Craft was aware of the Payment Bond that Moorhead had on the Project, which guaranteed payment to Craft for any work Craft completed on the Project. **[R. p. 500, line 15 – p. 501, line 2]**

[13] In not pursuing either PSL - by filing a mechanic's lien during the months in 2006 when it was not paid (discussed below) -or Moorhead either individually or through the Payment Bond for monies allegedly owed to Craft for Craft's work under contract with Moorhead and, instead, waiting until almost a year after it was last paid to pursue the innocent and perceived deep pockets of the Bank who owes absolutely no duty to Craft.

> must suffer a loss, it must be borne by that one of them, who, by his conduct, has rendered the injury possible. As a named payee on the check, the materialman had a right to satisfy its debt in full from the check proceeds. By its own conduct, it let that position of advantage slip away. It would be patently unfair in such circumstances to allow the party who could have protected his own interest to shift the consequences of his neglect to another who had no duty to protect him.

Glidden at 243, 349 S.E.2d at 91; see also City Lumber, Id.

There remains no legal or equitable basis for a personal judgment to have been entered against the innocent Bank in this case, as the Bank was never under any duty to protect the interests of Craft. Therefore, in accordance with the plain language and meaning of the relevant statutory scheme, the lower court's personal judgment against the Bank was in error and should be reversed.

II. DID THE LOWER COURT PROPERLY FIND AN UNDERLYING DEBT OWING TO RESPONDENT UNDER RESPONDENT'S MECHANIC'S LIEN CLAIM?

Craft's Mechanic's Lien was filed under S.C. Code Ann. §§ 29-5-20, 29-5-40, *et seq.* It is inherent within these code sections, and perhaps the most fundamental aspect of all mechanic's lien law, that a valid underlying debt be in existence for the lien to suffice. S.C. Code Ann. § 29-5-20[14]; S.C. Code Ann. § 29-5-40[15].[16] This principle could not be made any clearer than in the opinion rendered by the South Carolina Court of Appeals in the Glidden case, supra:

> The predicate for recovery in any [mechanic's lien foreclosure] suit[] is the existence of an unpaid debt. This is abundantly clear from a reading of the mechanic's lien statute ... As we have had occasion to observe in

[14] A primary purpose of S.C. Code §§ 29-5-20 and 29-5-40 is the protection of the property owner 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. Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 93 S.E.2d 855 (1956)(emphasis added).

[15] "[I]n 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(emphasis added).

[16] Again, A mechanic's lien exists only by virtue of statute; therefore, one's right to a mechanic's lien is wholly dependent upon the language of the statute creating it. Skiba v. Gessner, 374 S.C. 208, 648 S.E.2d 605 (2007); 22 S.C. Jur. Mechanics' Liens § 4 (2012).

> another context, a valid security interest cannot exist without a valid underlying debt. See Blackwell v. Powell, 346 S.E.2d 731 (S.C.Ct.App. 1986)(mortgage).

Glidden at 244, 349 S.E.2d at 91-92. Therefore, in order for any court of this State to find Craft's Mechanic's Lien proper, it must first find, in accordance with the plain language of the statute, that a valid unpaid debt is due Craft. Id.

In this case, the failure of Craft to prove it is owed the alleged debt is glaring. **[R. p. 499, line 21 – p. 515, line 5]** In the sworn Verified Statement of Account that Craft filed with the lower court, Craft alleged that it was owed $101,536.36. **[R. pp. 67-72]** Yet, the trial record clearly reflects Craft's shocking failure to simply account for the monies it claims it is owed[17], and the basis of such debt. **[Id.]** On at least three separate occasions – via cross-examination, re-direct examination by his own attorneys and again on re-cross examination – Craft was given the opportunity to prove the damages it claimed under its lien. **[Id.]** On each occasion, Craft failed miserably- even to the point where Craft's own counsel became exasperated with Craft's inability to simply prove the amount of damages it was alleging. **[Id.]** Yet, the lower court, after stating on the record that "[Mr. Craft]'s a little problematical[18] ... Mr. Craft's [claim] is problematic", concluded that Craft was owed "sort of a round number" of $70,000.00". **[R. p. 582, line 25 – p. 583, line 20]** However, there is absolutely no substantive proof whatsoever in the record that Craft is owed $70,000.00 – Craft could not even articulate (despite having the help of his own counsel while reviewing a written damages summary) any basis for any of the monies it alleged it was owed, much less $70,000.00.

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[17] Craft testified at trial that "after doing quite a bit of research", it was no longer alleging it was owed the $101,536.36 that it previously claimed under its lien; instead, it was now claiming the specific "correct and conservative" amount of "$85,499.67". **[R. p. 497, lines 2-21]**

[18] Craft's own attorney agreed, by stating in response on the record: "Yes, sir. I know Mr. Craft had trouble".

This damages amount is alarmingly arbitrary and unsupported by the credible evidence. Yet, appearing in the lower court's Order is the following: "I find by a preponderance of the evidence that this amount is $70,000.00. This figure is the approximate total of an unpaid invoice for $46,000.00 and retainage of $24,000.00." **[R. p. 14]** It is abundantly clear from the record that there was absolutely no credible proof provided in support of this breakdown of the $70,000.00. The documents of Craft itself, including those entered into the trial record by Craft itself, make clear that Craft was not owed $24,000.00 in retainage or $46,000.00 for an unpaid invoice. When presented during its testimony at trial with the fact that its own records do not support its claims, Craft merely alleged that its own records must be incorrect! **[R. p. 497, line 4 – p. 514, line 25]**

Furthermore, in order for the lower court to determine that a debt is due Craft under the mechanic's lien scheme, it is implied (naturally) that there is a party that is obligated to pay the debt.[19] In this case, the only determination the lower court made that can possibly be construed as a finding of a valid debt due Craft from another party is the personal judgment entered against the Bank in conjunction with Craft's mechanic's lien foreclosure claim. As discussed *supra*, this finding was clearly in error. The lower court found no party liable under Craft's Breach of Contract claim or Unjust Enrichment claim[20], so the lower court has failed to properly find that a debt is otherwise due Craft from anyone. Thus, Craft's lien claim must fail based on these most basic aspects of our

[19] "South Carolina's mechanics' lien laws provide an extra-contractual remedy by furnishing security for *debts* arising from construction contracts." 22 S.C. Jur. Mechanics' Liens § 2(emphasis added) citing S.C. Code Ann. §§ 29-5-10 to 29-5-430 (Law. Co-op. 1976 & Supp. 1992). "An expense is the same as a *debt, and it is incurred when liability for payment attaches.*" 14 S.C. Jur. Action of Debt II Refs.(emphasis added); 10 A.L.R. 3d 458.

[20] Craft didn't even file a claim against Moorhead, despite Craft admitting via sworn testimony at trial that Moorhead was the party that owes Craft the alleged debt. **[R. p. 500, lines 15-18]**

mechanic's lien law; the lower court's order and shocking findings to the contrary were in error and should be reversed.

III. DID THE LOWER COURT ERR IN FINDING THE RESPONDENT'S MECHANIC'S LIEN WAS FILED IN ACCORDANCE WITH THE TIME LIMITATIONS FOUND IN S.C. CODE ANN. §§ 29-5-90 AND 29-5-120?

A mechanic's lien, or rather the right to a lien, arises, inchoate, when labor is performed or material furnished. Wood v. Hardy, 235 S.C. 131, 138, 110 S.E.2d 157, 160 (1959). However, to be valid, the lien must be perfected and enforced in compliance with the Mechanic's Lien Statutes, S.C. Code Ann. §§ 29-5-10 to – 430 (1976). See Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 93 S.E.2d 855 (1956).

First, in accordance with the following unequivocal directives found in S.C. Code Ann. § 29-5-20, in order for the work allegedly performed by Craft on March 7, 2007 to be 'lienable', it had to have been "authorized by the owner" of each liened tract. S.C. Code Ann. § 29-5-20[21]

Further, in the case of Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 631 S.E.2d 252 (2006), the South Carolina Court of Appeals held:

> In order to perfect and enforce a mechanic's lien, the person asserting the lien (1) must serve upon the owner or person in possession and file with the register of deeds or clerk of court a notice or certificate of lien containing the lien amount, a description of the real property, and other required information 'within ninety days after he ceases to labor on or furnish labor or materials for such building or structure'[22]; (2) must commence a lawsuit seeking to enforce the lien within six months after

[21] "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..." S.C. Code Ann. § 29-5-20(emphasis added).

[22] Section 29-5-90, mandating service and filing of a certificate of lien, provides in pertinent part:

> Such a lien shall be dissolved unless the person desiring to avail himself thereof, *within ninety days after he ceases to labor on or furnish labor or materials for such building or structure*, serves upon the owner ... a statement of a just and true account of the amount *due him*, with all just credits given ... which certificate ... shall be recorded in a book kept for the purpose by the register or clerk...

S.C. Code Ann. § 29-5-90 (emphasis supplied).

> ceasing to provide labor or materials for such real property[23]; and (3) must file a notice of the pending action (lis pendens) within six months after ceasing to provide labor or materials for such real property.

Butler Contracting at 129, 631 S.E.2d at 256. "If these steps are taken, the person claiming the lien may foreclose against the property to satisfy the debt. On the other hand, if he fails to take any one of these steps, the lien against the property is dissolved pursuant to Sections 29–5–90 and 25–9–120." Id.

"The statute requires that the certificate include a statement 'of the amount due him,' and that it be filed 'within ninety days after he ceases to labor.' The clear meaning of this language is that the labor contemplated in the filed statement has already been performed within 90 days prior to the filing." Preferred Sav. & Loan Ass'n v. Royal Garden Resort, Inc., 301 S.C. 1, 4, 389 S.E.2d 853, 854 (1990). Both time limits "run from the same event: the certificate of lien must be filed within 90 days, and the foreclosure suit must be commenced within six months, *after* the lienor 'ceases to furnish labor or materials'." Id.

In order to prevent lien claimants in this State from improperly manufacturing their last date of work for purposes of trying to revive their otherwise expired lien rights, the courts of this State have delineated a threshold for the level of services performed and the level of materials furnished on the date when cessation of labor is alleged by the lien claimant. Butler Contracting, supra; Wood v. Hardy, 235 S.C. 131, 110 S.E.2d 157 (1959). The South Carolina Supreme Court has ruled that when an unreasonable period of time has elapsed since substantial completion of the work, the performance of trivial

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[23] Section 29-5-120 contains the limitations period for commencing suit to foreclose a mechanic's lien. This statute reads:

> Unless a suit for enforcing the lien is commenced, and notice of pendency of the action is filed, *within six months after the person desiring to avail himself thereof ceases to labor on or furnish labor or material for such building or structures*, the lien shall be dissolved.

S.C. Code Ann. § 29-5-120 (emphasis supplied).

services or the furnishing of trivial materials generally will not extend the time for filing the certificate past the date of substantial completion.[24] Butler Contracting at 131, 631 S.E.2d at 257-58. If, however, subsequent to the date of substantial completion, trivial services or materials are provided *at the request of the owner*, rather than at the initiative of the contractor for the purpose of saving a lien, the furnishing of such work or material will extend the commencement of the period for filing a certificate of mechanic's lien.[25] Id.(emphasis added).

In some cases, the last material furnished or last work performed on a job may satisfy the 'last date of work' statutory analysis even if such material or work is insignificant or delayed. Id. However, the reason for the delay shall not be to improperly extend the period of perfecting the lien, and the work performed or materials furnished must be *considered by the parties to the contract to be necessary for compliance with the contract* and to fulfill the duty of good faith and fair dealing which is an implied term of every contract. Id.(emphasis added) But, the implied duty of good faith and fair dealing is not recognized absent proof of a *still valid, underlying contract.* Dodgens v. Kent Mfg. Co., 955 F. Supp. 560, 21 A.D.D. 192 (D.S.C. 1997) (applying South Carolina law)(emphasis added); 30 S.C. Jur. Contracts § 47 (2013). Moreover, the implied duty of good faith and fair dealing *does not extend to one that is not a party to the underlying*

[24] The time for filing a mechanic's lien begins to run from the time the last item of the account is furnished, *when the entire account is a continuous and a connected transaction.* Wood at 139, 110 S.E.2d at 160-61(emphasis supplied).

[25] "Where a claimant, after a contract is substantially completed, does additional work or furnishes additional material which is necessary for the proper performance of his contract, and which is done in good faith *at the request of the owner* or for the purpose of fully completing the contract, and *not merely as a gratuity* or act of friendly accommodation, the period for filing the lien will run from the doing of such work or the furnishing of such materials, irrespective of the value thereof." Wood v. Hardy, 235 S.C. 131, 140, 110 S.E.2d 157, 161 (1959)(emphasis added); see also Butler Contracting at 130-131, 631 S.E.2d at 257.

contract. Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co., 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003)(emphasis added).

Prior to getting into the mechanics of Sections 29-5-90 and 29-5-120, a determination must first be made under Section 29-5-20 regarding whether the owners of the liened tracts authorized Craft to perform its alleged work. Based on Craft's testimony, Craft did not get the consent of the Bank, and was not authorized by anyone, to do the purported work on March 7, 2007 on Tract A, as Craft did not even know who the Bank was at that time. **[R. p. 501, lines 3-22]** Likewise, Craft had not entered into any agreement with the Bank, and was not authorized by anyone, to do the work. **[Id.]** Further still, Craft did not get the prior consent of, or enter into an agreement with, Zellner or PSL, and was not authorized by anyone, to do any work on Tract B or The 2 Acre Tract. **[Id.]** In fact, as outlined below, Craft had been instructed by Moorhead in February 2007 to *not* do any more work on the Project because Moorhead's underlying contract with PSL had been mutually terminated. **[R. p. 456, line 20 – p. 457, line 16]**

Ignoring the fundamental failure of Craft to obtain authorization from the owners for the purported March 7, 2007 work (and the lethal effect of same to Craft's lien claim), all credible evidence in this case establishes that the lien filed by Craft and the associated foreclosure suit filed by Craft were not timely in accordance with Sections 29-5-90 and 29-5-120. Craft filed its Mechanic's Lien on May 25, 2007 whereby Craft alleges that its last date of work on the Project occurred on March 7, 2007. Craft filed the underlying lawsuit to foreclose its lien on August 31, 2007. The lower court found that Craft's last date of work on the Project was on March 7, 2007 and that the filing of Craft's lien and foreclosure Complaint were, thus, timely. **[R. pp. 9-10]**

However, the only credible evidence presented at trial proves that the last date that Craft performed labor sufficient to satisfy the 'last date of work' standards of S.C. Code Ann. § 29–5–10, *et seq.* was long before February 16, 2007- the date when Moorhead entered into an agreement with PSL that terminated their contract and the date when Moorhead confirmed with its subcontractors, Miller and Craft, that Moorhead's "contract with Pendleton Station has been mutually dissolved".[26] **[R. p. 456, line 1 – p. 457, line 16; p. 458, lines 2-10; pp. 721-722;.]** Moorhead recalled instructing Miller and Craft to "[p]lease cease any and all work being done on this project." **[R. p. 456, line 1 – p. 457, line 16; p. 458, lines 2-10; pp. 721-722]**

Billy Craft was the only witness that testified at trial on behalf of Craft. The only evidence of substance noted by the lower court in its order regarding the issue of whether Craft's lien was timely was Mr. Craft's testimony. **[R. pp. 9-10]** While the lower court also referenced the testimony of two non-parties concerning their general impression of Mr. Craft's trustworthiness, the lower court provided only the following findings of fact regarding the timeliness of Craft's lien:

> Billy Craft testified on behalf of Craft Construction. ... He testified that his last date performing work on the real property under contract for Moorhead was on March 7, 2007. He testified that his employees were performing work on a force main essential to providing sewer services on the project. ...
> I also find that there was *no testimony* presented that would refute Mr. Craft's testimony as to when Craft's last date of work was on the project. Accordingly, I find by a preponderance of the evidence that Craft's last date of work under contract for Moorhead was March 7, 2007. This would mean the notice of mechanic's lien was timely filed and served within the ninety (90) days called for by statute. S.C. Code Ann. § 29-5-20[*siq*].

[R. pp. 9-10 (emphasis added)].

[26] This February 16, 2007 date was more than 90 days prior to the May 25, 2007 date when Craft filed its lien, and more than 6 months prior to the August 31, 2007 date when Craft filed its foreclosure Complaint-making both the lien and foreclosure suit untimely.

Contrary to the astonishing 'finding' of the lower court that "*no testimony was presented* that would refute Mr. Craft's testimony as to when Craft's last date of work was on the project", extensive testimony and significant evidence was presented that absolutely refutes Mr. Craft's testimony regarding his alleged March 7, 2007 last date of work.[27] **[R. p. 10 (emphasis supplied)]**. Strikingly, the most compelling of this evidence came in the form of documents generated by, on behalf of or for the benefit of Craft and via testimony provided by Craft. This compelling testimony and evidence makes it clear that Craft's statutory last date of work was well before 90 days prior to May 25, 2007 and well before 6 months prior to August 31, 2007.

Mr. Craft testified: (a) that Craft installed a sewer force main on March 7, 2007 even though a sewer line pressure test was performed almost a year prior in April of 2006, (b) that Craft's last pay request for sewer work was submitted after the pressure test in May 2006, (c) that this pay application included a lien waiver indicating no other monies owed, (d) that Craft was paid in full on this pay application in May 2006, (e) that nobody, including the owners (the Bank, Zellner or PSL) or the general contractor (Moorhead) called Craft out to the site to perform any such work on March 7, 2007, (f) that Craft never put the Bank, Zellner, PSL or Moorhead on notice that it was doing any sewer work on-site after the Bank became the owner, (g) that Craft had not submitted any pay request to anyone after early 2006, including the Bank, PSL, Zellner or Moorhead, for any outstanding work, including the work purportedly performed on March 7, 2007,

[27] For starters, there was absolutely no testimony or evidence produced by anyone claiming that the work Craft allegedly did on March 7, 2007 was "essential to providing sewer services on the project". **[R. pp. 9-10]** It defies logic for a determination to be made that any work provided by Craft on the project on this alleged date was "essential" when it is undisputed that: (1) on that date the project was no longer under the ownership or control of PSL; (2) a month earlier Craft's contract with Moorhead (the only basis for Craft's obligations to ever perform any work on the Project) was terminated; and (3) Craft admits that it was not called by anyone to do the alleged work on that date (or on any date after its contract had been terminated). **[R. pp. 773-776; p. 456, line 20 – p. 457, line 16; p. 510, line 1 –p. 511, line 19]**

(h) that Craft already billed for the work months prior showing that the work was 100% complete while admitting that Craft never bills for work in advance, (i) that Craft was on notice from Moorhead in February 2007 (at the latest) that Craft was to cease its work on the Project because the underlying contract was terminated, and, importantly, (j) that Craft could not even provide a basis for the damages he was alleging, to include even a simple accounting to support his alleged damages amount. **[R. p. 499, line 1 – p. 511, lines 6-25; pp. 723-732; pp. 665-674]** Further still, Charlie Kernaghan testified to driving by the project site at least twice each day after March 5, 2007 until a fence was installed a week or two later, and that he never saw anyone working on-site during this time frame.[28] **[R. p. 557, lines 9-12; p. 562, line 19 – p. 563, line 9]**

Furthermore, Moorhead, the party with whom Craft contracted submitted its last Pay Application to PSL for work completed on the Project by Moorhead and its subs, including Craft, on November 13, 2006.[29] **[R. p. 456, lines 1-13]** This Pay Application #15 was a request for payment from PSL for work that Moorhead claimed was done on the Project under its contract "thru 10-25-06". **[Id.; R. p. 455, line 3 – p. 456, line 19; pp. 699-704]** Even though the Project was not complete as of the October 25, 2006 date, Moorhead did not submit another Pay Application for its work (or for the work of any of its subs) on the Project. **[Id.]** Reasons being: (1) the Pay Applications outstanding at that time represent the only monies allegedly still owing Moorhead and its subs for the work they completed on the Project; and (2) Moorhead became embroiled in a dispute with

[28] Yet, Craft alleges that 5 of his employees were on-site for 8 hours apiece on March 7, 2007.

[29] Further, Moorhead claimed - in its mechanic's lien ("Moorhead Lien"), in its complaint ("Moorhead Complaint") and in the testimony it provided – that its last date of work on the Project was on March 6, 2007. **[R. Pp. 79-84; pp. 106-121]** Ignoring for the time being the Bank's appeal of the lower court's Moorhead Order and the issues with Moorhead's lien, Craft's subcontract work under Moorhead's contract with PSL could not have exceeded the time when Moorhead's statutory last date of work was on the Project.

PSL regarding change order work at this time, which led to Moorhead pulling off the Project during this October 2006 timeframe. **[R. p. 447, line 2 – p. 453, line 5]**

In accordance with the Butler Contracting case, there being no question that Craft had substantially completed its work on the Project some months before March 7, 2007 (more than 90 days prior to its May 25, 2007 lien date and more than 6 months before its Complaint was filed), an analysis must then be made regarding the type of work alleged to have been performed by Craft on March 7, 2007 to determine: (1) whether it was gratuitous; and (2) whether it was at the request of the owner. Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 131, 631 S.E.2d 252, 257-58 (2006). Strikingly, Mr. Craft testified that Craft was not instructed by anyone – the Bank, Zellner, PSL (owners of the properties where the work allegedly took place), or anyone else (including even Moorhead) – to do the alleged work. **[R. p. 510, line 1 – p. 511, line 19]** Craft testified that it did not expect to get paid for the work, that it did not bill for any work on the Project after May 2006, and that the only money it was owed was for work it performed before its May 2006 Pay Application. **[R. p. 502, line 4 – p. 509, line 23]** Furthermore, the testimony and evidence makes clear that, throughout this same time, Craft voluntarily chose not to file a claim against Moorhead's Payment Bond despite Craft's knowledge of same. **[R. p. 500, line 19 – p. 501, line 6]**

Further still, Craft's testimony confirms that the work performed could in no way be considered furnished as the last item of its contract, as the contract had been terminated long before. Likewise, Craft's testimony (together with Moorhead's) confirms that the alleged last work was not a part of a continuous contract such that the alleged work could otherwise be considered a connected transaction. Wood at 139, 160-61.

It is clear in this case that Craft is claiming a lien under the narrow grounds that the work it alleges it performed on March 7, 2007 was considered by the parties to the contract to be necessary for compliance with the contract and to fulfill the duty of good faith and fair dealing which is an implied term of every contract. However, notwithstanding the myriad of other issues with Craft's position, the implied duty of good faith and fair dealing is not recognized absent proof of a *still valid, underlying contract.* Dodgens v. Kent Mfg. Co., 955 F. Supp. 560, 21 A.D.D. 192 (D.S.C. 1997) (applying South Carolina law)(emphasis added); 30 S.C. Jur. Contracts § 47 (2013). And, in this case, the evidence reveals that any such contract was mutually terminated long before the alleged work took place. **[R. p. 456, line 1 – p. 457, line 16; pp. 721-722]** Moreover, the implied duty of good faith and fair dealing owed in the contract between Craft and Moorhead before it was terminated does not extend to parties such as the Bank, Zellner and PSL who were never parties to that underlying contract. Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co., 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003).

The undisputed facts of this matter make it clear that the level of services allegedly performed by Craft on March 7, 2007 do not pass the threshold established by the courts of this State to qualify the same as the lienor's 'last date of work' for purposes of satisfying the statutory requirements of S.C. Code Ann. §§ 29-5-90 and 29-5-120. The 'work' alleged to have been completed by Craft was by Craft's own admission gratuitous, as no one asked Craft to perform the work. The courts of this State have made clear that the performance of such gratuitous services will not extend the time for filing the certificate past the date of substantial completion. Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 131, 631 S.E.2d 252, 257-58 (2006). Even if Craft actually did the

gratuitous 'work' it alleges, an unreasonable period of time elapsed since substantial completion of the work. And, the work was not provided at the request of any of the owners (or anyone else). Rather, based on the undisputed facts, it is abundantly clear that the alleged work was done at the initiative of Craft for the sole purpose of trying to revive its otherwise long expired lien rights.[30]

One of the main purposes of the mechanic's lien statutory scheme is "the protection of the owner by preventing his liability on the liens from exceeding the amount owner owes on the contract price." Taylor Cotton and Ridley Inc. v. Okatie Hotel Group, LLC, 372 S.C. 89, 96, 641 S.E.2d 459, 462 (2007). In light of the facts of this matter, the lower court's determinations that Craft's statutory last date of work was March 7, 2007 and that Craft's mechanic's lien and foreclosure suit were both filed in a timely manner were in error and should be reversed.

IV. IS THE APPELLANT'S LIABILITY, IF ANY, UNDER THE RESPONDENT'S MECHANIC'S LIEN CLAIM LIMITED TO THE BALANCE DUE BY THE OWNERS OF EACH LIENED TRACT AT THE TIME THE OWNERS RECEIVED NOTICE FROM RESPONDENT OF THE ALLEGED DEBT DUE?

It has been established by the courts of this State that an owner's liability under the mechanic's lien statutes is limited to the balance due by the owner to the prime contractor at the time the owner received notice of the claim. Lowndes Hill Realty Co. v.

[30] These undisputed facts beg the questions of: why did Craft return to the project site on March 7, 2007? Why did Craft return to the Project many months (more than 90 days) after his last date of work? Why did Craft return to a Project to allegedly perform work when he had not been paid for his previous work – knowing at the time when he allegedly returned that others were still not getting paid on the same Project? Why did Craft return to the Project to perform not corrective work, but work under the contract that he knew had been cancelled months earlier? Why did Craft not file a claim against Moorhead's payment bond? And, why did Craft not file any claim in its Complaint against Moorhead? If this alleged work was performed by Craft (the Bank maintains that the evidence proves that the work was never completed), it was clearly done unilaterally by Craft without solicitation or request from the Bank (or anyone else) and only in a contrived attempt by Craft to revive its lien rights in hopes of somehow getting to the perceived deep pockets of the Bank. See Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 631 S.E.2d 252 (2006).

Greenville Concrete Co., 229 S.C. 619, 629-630, 93 S.E.2d 855, 860 (1956); Wood v. Hardy, 235 S.C. 131, 138, 110 S.E.2d 157, 160 (1959). Again, this is the case because one of the main purposes of this State's statutory mechanic's lien scheme is "the protection of the owner by preventing his liability on the liens from exceeding the amount owner owes on the contract price." Lowndes Hill Realty at 629, 93 S.E.2d at 860; Taylor Cotton and Ridley at 96, 641 S.E.2d at 462. This is evidenced by the plain and ordinary meaning[31] of the relevant statutes, S.C. Code Ann. §§ 29-5-10[32], 29-5-20[33], 29-5-40[34], *et seq.* Taylor Cotton and Ridley at 96-97, 641 S.E.2d at 463. In order for the Court to find the Plaintiff's mechanic's lien proper, it must find, in accordance with the plain language of the statute, that a debt is due the Plaintiff, and that debt is due *by the owner* of the liened property.

A. IS THE APPELLANT'S LIABILITY UNDER RESPONDENT'S MECHANIC'S LIEN ON 'TRACT A' LIMITED TO THE BALANCE FOUND DUE BY APPELLANT TO THE RESPONDENT AT THE TIME THE APPELLANT RECEIVED NOTICE FROM RESPONDENT?

In the case at hand, it is undisputed that Craft filed its lien on May 25, 2007 for work it alleged it provided under the contract it had with Moorhead. It is also undisputed that the Bank became owner of Tract A on March 5, 2007 without notice of Craft's claim- the Bank first received notice of Craft's claim after March 5, 2007. **[R. p. 501,**

[31] Again, a mechanics' lien exists only by virtue of statute; therefore, one's right to a mechanics' lien is wholly dependent upon the language of the statute creating it such that the mechanic's lien protection does not extend to those persons who are not within the protected class identified in the statutes. Skiba v. Gessner, 374 S.C. 208, 212, 648 S.E.2d 605, 606 (2007).

[32] S.C. Code Ann. § 29-5-10 provides, in pertinent part: "A person to whom a debt is due ... by virtue of an agreement with, or by consent of, the owner of the building or structure ... shall have a lien upon the building or structure and upon the interest of the owner ... to secure the payment of the debt due to him [by the owner pursuant to such agreement with owner]."*Id.*

[33] S.C. Code Ann. § 29-5-20 provides, in pertinent part: "[I]n no event shall the total aggregate amount of liens on the improvement exceed the amount *due by the owner.*" *Id.*(emphasis added).

[34] S.C. Code Ann. § 29-5-40 provides, in pertinent part: "[I]n no event shall the total aggregate amount of liens set up hereby exceed the amount *due by the owner* on the contract price for the improvement made." *Id.*(emphasis added).

lines 3-22; pp. 326-329; pp. 308-310; pp. 305-307] Craft testified at trial to never notifying the Bank prior to the March 5, 2007 Deed in Lieu of any alleged debt due Craft. It is also undisputed that at no time, including the time when Craft first notified the Bank of the alleged debt due Craft, has the Bank ever owed any money to Craft for anything, including the work Craft alleges to have completed under its lien. **[Id.; R. p. 440, line 14 – p. 441, line 6; p. 443, line 25 – p. 444, line 5]** Thus, Craft's Mechanic's Lien fails as a matter of law as against Tract A, and the lower court's ruling to the contrary is in error and should be reversed.

B. IS THE APPELLANT'S LIABILITY UNDER RESPONDENT'S MECHANIC'S LIEN ON 'THE 2 ACRE TRACT' LIMITED TO THE BALANCE FOUND DUE BY THE OWNER OF 'THE 2 ACRE TRACT' (PENDLETON STATION, LLC) TO THE RESPONDENT AT THE TIME PENDLETON STATION, LLC RECEIVED NOTICE OF SAME FROM RESPONDENT?

PSL was the owner of The 2 Acre Tract at the time Craft notified PSL of the amount Craft claimed it was due from Moorhead under its lien. **[R. pp. 777-780]** Due to the relationship between Moorhead and Craft together with the lack of any relationship between Craft and PSL, any amount due by PSL to Craft under such a lien claim would have to arise via the work Craft allegedly performed under the contract between Craft and Moorhead. However, the lower court did not rule in Craft's favor (or Moorhead's favor) regarding the amounts Craft (and Moorhead) alleged to be due by PSL under either of Craft's (or Moorhead's) breach of contract claim or unjust enrichment claim against PSL[35] (instead, entering a personal judgment against the Bank). **[R. pp. 5-19; pp. 20-33]** And, Craft did not even file a claim against Moorhead. As detailed herein, PSL deeded The 2 Acre Tract to the Bank after PSL was notified by Craft of same (said deed being

[35] Notably, Craft chose not to appeal this decision of the lower court.

subject to Craft's lien). Therefore, as logic dictates, the Bank's liability (both in rem and in personae, as discussed herein) must also be nil with respect to Craft's lien claim against The 2 Acre Tract, resulting in Craft's mechanic's lien failing as a matter of law and the lower court's ruling being in error requiring reversal.

C. IS THE APPELLANT'S LIABILITY UNDER RESPONDENT'S MECHANIC'S LIEN ON 'TRACT B' LIMITED TO THE BALANCE FOUND DUE BY THE OWNER OF TRACT B (DIANA L. ZELLNER, TRUSTEE FOR THE DIANA L. ZELLNER REVOCABLE TRUST UAD) TO THE RESPONDENT AT THE TIME THE OWNER OF TRACT B RECEIVED NOTICE FROM RESPONDENT?

It is undisputed that Zellner was the owner of Tract B when it was first notified of Craft's claim. **[R. pp. 781-785]** Craft voluntarily dismissed Zellner from its lawsuit prior to the underlying trial – even after Zellner filed a counterclaim against Craft alleging Craft trespassed onto Tract B to do the work it alleges. **[R. p. 4; pp. 226-233]** At trial, Craft put forth no evidence whatsoever regarding any debt owed by Zellner to Craft (via agency theory or otherwise), including any debt resulting from any alleged work performed by Craft on Tract B. Moreover, as addressed above, the lower court did not rule in Craft's favor regarding Craft's claim against PSL for the work Craft alleged to have completed on Tract B under its contract with Moorhead.

As with The 2 Acre Tract, Tract B was deeded to the Bank by Zellner after Craft's lien was filed. Having found no debt owing by either Zellner or PSL to Craft for any purported work performed by Craft on Tract B, the Bank's liability must also be nil with respect to Craft's lien claim against Tract B, resulting in Craft's mechanic's lien failing as a matter of law. Thus, the lower court's ruling is in error and should be reversed.

V. DID THE LOWER COURT ERR IN ENFORCING THE RESPONDENT'S MECHANIC'S LIEN ON 'TRACT A' AGAINST THE PREVIOUSLY RECORDED AND UNSATISFIED MORTGAGE OF APPELLANT?

S.C. Code Ann. § 29-5-70, *et seq.*, titled 'Force of Lien against Existing Recorded Mortgage' provides:

> Except as otherwise provided in Section 29-3-50, a lien claimed by any mechanic or materialman furnishing labor, services, or material is not enforceable against any mortgage before the filing of the notice pursuant to Section 29-5-90 setting forth the statement of account upon which the lien is based.

S.C. Code Ann. § 29-5-70. Even Craft, in the Mechanic's Lien Foreclosure Cause of Action in its Complaint, seemed to acknowledge this established law as Craft's claim-specific prayer for relief requested the lower court to foreclose its lien "subject to recorded mortgages." **[R. pp. 85-105]** The mortgage of the Bank was filed against Tract A beginning in August 2005. **[R. pp. 677-688]** Craft's mechanic's lien was filed against Tract A in mid-2007. Therefore, in light of the unambiguous language found in S.C. Code Ann. § 29-5-70, Craft's lien is not enforceable against the Bank's previously filed mortgages on the property known as Tract A. The lower court's ruling to the contrary was in error and should be reversed.

VI. DID THE LOWER COURT ERR IN FINDING THAT NEITHER THE PRIOR MORTGAGE NOR PRIOR DEED TO APPELLANT WAS SENIOR IN PRIORITY TO RESPONDENT'S SUBSEQUENTLY FILED MECHANIC'S LIEN AGAINST 'TRACT A'?

With respect to the property known as Tract A, it is the position of the Bank that when applying the recording statute of this State, S.C. Code Ann. § 30-7-10, Craft's subsequently filed mechanic's lien cannot be foreclosed against the interests of the Bank based on either the prior mortgage or prior deed filed in favor of the Bank. S.C. Code Ann. § 30-7-10; The Lite House v. J.C. Roy Co., Inc., 309 S.C. 50, 51, 419 S.E.2d 817, 818 (Ct App. 1992). The courts of this State have established that "a mortgagee is

entitled to the advantage of the doctrine of equity of purchaser for a valuable consideration without notice." Norwood v. Norwood, 36 S.C. 331, 15 S.E. 382, 384 (1892); The Lite House, *supra*.

Craft testified that prior to March 5, 2007, it never provided notice to the Bank for the alleged amounts due because it had no contract with the Bank and did not know that they were involved on the Project or even who they were. **[R. p. 501, lines 3-22]** There is no evidence in the record that the Bank, prior to March 5, 2007 had any notice of the debt Craft alleges it is due. The lower court's order discusses the knowledge gained by the Bank *after* the deed in lieu of foreclosure regarding unpaid contractors ("by virtue of the numerous payments to unpaid contractors just days *after* receiving the deed in lieu of foreclosure, Enterprise Bank clearly had notice that there were a number of unpaid contractors on this project"), but, as the record reflects, the Bank had no notice of Craft's claim *prior* to the deed in lieu of foreclosure. **[R. p. 11 (emphasis added)]**. Moreover, it is inequitable to declare that the Bank paid nothing of value for Tract A when testimony was provided on behalf of the Bank that it loaned over $5 Million to PSL for the infrastructure improvements (including those performed by Craft) on the subject property, and was not repaid the outstanding balance of several million dollars. **[R. p. 420, lines 18-19; p. 542, lines 18-23]**

It remains clear in this case that the Bank, by its prior recorded mortgage and/or its prior recorded deed, has priority over Craft's subsequently filed mechanic's lien on Tract A. Therefore, the lower court's order finding Craft's lien to be senior to the interests of the Bank was in error and should be reversed.

VII. DID THE LOWER COURT ERR IN ITS FINDING ON THE DOCTRINE OF MERGER?

A. DID THE LOWER COURT ERR IN ISSUING AN ORDER ON THE DOCTRINE OF MERGER IN LIGHT OF THE LOWER COURT'S AFFIRMATION ON THE RECORD THAT ANY STATEMENTS IT HAD MADE REGARDING MERGER IN THIS CASE SHOULD ONLY BE CONSIDERED 'DICTUM'?

First, as the record reflects, the doctrine of merger was not at issue in this matter. However, as the record also reflects, the lower court volunteered its opinion regarding the doctrine of merger without any solicitation from the Bank, Craft or any other party. **[R. p. 585, lines 8-20; p. 599, line 6 – p. 605, line 10; p. 625, line 24 – p. 627, line 20]** When the lower court attempted to provide additional unsolicited commentary on this issue at the final hearing, the Bank was compelled to bring to the lower court's attention what all parties otherwise knew – that this narrow issue was being litigated in a separate matter (the Bank Lawsuit) between the Bank and PSL pending in the same circuit before a different judge who had already ruled that the issue was to be heard by a jury in that case.[36] In response, the lower court apologetically indicated on the record: "if that's not before me I don't need to hear anything about it." **[R. p. 605, lines 3-4]** The lower court then further recanted by immediately proclaiming that its statements on the subject of merger were "dictum. Consider it dictum". **[R. p. 605, lines 3-8]**

In the case of Nash v. Tindall Corp., 375 S.C. 36, 650 S.E.2d 81 (2007), the South Carolina Court of Appeals established that:

> Judicial dicta is "not essential to the decision." Dicta or, as it is also known, dictum "is a statement on a matter not necessarily involved in the case, and is not binding as authority. Dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, is not the court's decision."

[36] Judge Nicholson, before whom the Bank Lawsuit was being litigated at the time, had previously ruled in an order he rendered on a summary judgment motion that the matter was factual and was to be tried before the jury in that case ("Judge Nicholson Order"). **[R. pp. 61-66]**

Id. at 40-41, 650 S.E.2d 81, 83 (internal citations omitted).

Despite the dictum qualification being clearly provided on the record by the lower court, its Order not only includes a ruling on the issue of merger[37], it provides a lengthy analysis of what it deems (incorrectly) the controlling law on the doctrine of merger in this State. **[R. pp. 10-13, 16]** The lower court's order in this regard was in error and should be reversed.

B. DID THE LOWER COURT'S ORDER ON THE DOCTRINE OF MERGER VIOLATE THE LAW IN THIS STATE THAT ONE LOWER COURT JUDGE DOES NOT HAVE THE POWER TO REVIEW, MODIFY, AFFIRM OR REVERSE THE FINDINGS OF ANOTHER LOWER COURT JUDGE?

The lower court's statements on the record making clear that its prior voluntary commentary regarding merger being mere "dictum" together with the context in which the lower court's retraction occurred indicated to the Bank the lower court's acknowledgement of the well established legal principle that one circuit court judge may not reverse or modify the order of another circuit judge. Binkley v. Burry, 352 S.C. 286, 573 S.E.2d 838 (2002).[38] Therefore, neither the Bank nor any other party attempted to try the merger issue via testimony, documentary evidence or otherwise. However, the lower court then proceeded in its Craft Order to rule (at length) on the issue of merger.

Not only was the lower court's ruling in violation of the Bank's fundamental rights to a fair trial, the lower court's ruling on the issue of merger was in error in light of the well established principle that one circuit court judge does not have the power to set

[37] The record reflects zero evidence that would support a determination that merger applies. In fact, the only evidence submitted at trial that could possibly be construed as evidentiary support for a ruling on merger came via sworn testimony from the Bank. And, such testimony makes it clear, upon applying the correct law, that merger did not apply here.

[38] Enoree Baptist Church v. Fletcher, 287 S.C. 602, 340 S.E.2d 546 (1986) ("One circuit court judge does not have the authority to set aside the order of another."); State ex rel Medlock v. Love Shop Ltd., 286 S.C. 486, 334 S.E.2d 528 (1985) ("It is well settled that one circuit court judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge.").

aside the order of another. Thus, the lower court's ruling should be reversed.

C. DID THE LOWER COURT ERR IN ITS INTERPRETATION AND APPLICATION OF THE CURRENT LAW ON MERGER IN THIS STATE?

The purported law referenced in the lower court's Craft Order (below) is neither a complete, nor accurate portrayal of the law on merger in this State. **[R. pp. 10-13]** Rather, as is plainly evident from the chronology of opinions issued throughout the history of this State on merger, the lower court has cited the outdated, 19th Century version of this increasingly irrelevant legal doctrine. The failure of the lower court to not even cite the opinion that has been heralded by more recent courts of this State as both "masterful" and the "leading case in this state on the subject of merger" [39] is as uniquely troubling to the Bank as the opinion offered by the lower court on what the Bank had been led to believe by the lower court on the record as being mere "dictum".

Despite it being well established in this State that the seminal case regarding the merger doctrine is McCreary v. Coggeshall, 74 S.C. 42, 53 S.E. 978 (1906), the lower court inexplicably claimed in its Order that:

> *This rule [of merger] is perhaps no more clearly stated than in the case of Bleckley v. Branyan*, 26 S.C. 424, 2 S.E.2d 319 (1887). There the Supreme Court held:
>
> > It must be taken to be settled in that state by a long line of adjudications, both in law and equity, 'that a mortgagee who buys the estate under mortgage not under process of foreclosure, extinguishes the debt or claim with him on the property.'
>
> 2 S.E.2d at 321; see also, 275 S.C. Jur. Mortgages § 61 (2007) and 55 Am. Jur. Mortgages § 1340 (2007) ("Ordinarily, a transfer of the interest of the mortgagor in the mortgaged property to the mortgagee operates as a merger of the two estates, which effect a discharge of the mortgage and a satisfaction of the debt.") Therefore, based upon the doctrine of merger, Enterprise Bank was no longer a mortgagee since the mortgage and debt

[39] See Owings v. Graham, 120 S.C. 408, 408, 113 S.E. 279, 292 (1922) (proclaiming the McCreary opinion to be 'masterful') and see McCraney v. Morris, 170 S.C. 250, 170 S.E. 276, at 279, 95 A.L.R. 622 (1933) (calling McCreary the 'leading case in this state on the subject of merger').

had been satisfied but became the fee simple owner of the property but not as a bona fide purchaser for value without notice of prior claims.

[R. p. 12 (emphasis added)][40].

The McCreary opinion offers a unique, broad review of the history of this old, outdated English legal doctrine. In discussing the application of the McCreary case, the Supreme Court of South Carolina issued the following opinion in the case of McCraney v. Morris, 170 S.C. 250, 170 S.E. 276 (1933):

> After reviewing many, if not all, of the former decisions of this court on the law of merger, including the Richardson and *Bleckley* Cases, cited in the report and decree in the lower court, Mr. Justice Woods, for this court, said: 'From this review we think it clear the later cases in this state establish the proposition, which as we have seen is in accord with the doctrine universally recognized in other jurisdictions, that in equity at least *merger will not take place if opposed to the intention of the parties, affirmatively proved, or to be implied from the fact that merger would be opposed to the interest of the person in whom the different estates or interests become united. This doctrine is sustained by an unbroken current of authority in the other states of the Union.*'
>
> That the principles declared by Mr. Justice Woods are generally recognized as being just and equitable is shown by the interesting article on "Merger and Subrogation" in that excellent work, Jones on Mortgages (8th Ed.) vol. 2, beginning at page 508. Speaking on the subject of the effect of the acceptance by a mortgagee of a conveyance of the equity of redemption, the learned author, Mr. Jones, at page 521, says: "*The expressed intention will control; but in the absence of such express intention on the part of the mortgagee his intention will be presumed in accordance with his interests." Further (page 523), it is said: "When there is no evidence of the intention of the owner in uniting the legal and equitable estates in himself, it is proper to presume that he intended that effect which is the most beneficial to himself. Therefore, if the estate be subject to other incumbrances, which he is under no obligation to pay, and it is better for him to preserve the lien of the prior mortgage rather than to extinguish it, and let the next subsequent incumbrance into its place of priority, these facts may be taken as sufficient ground for inferring that his*

[40] Throughout this portion of the Craft Order, the lower court cites non-authoritative secondary sources in an attempt to support its flawed analysis. One such cite includes a parallel cite to the case of Kirkman v. Parex, Inc., 369 S.C. 477, 632 S.E.2d 854 (2006). The Kirkman opinion, including the "discussion of facts" found therein, has absolutely no relevance to the issue of merger; rather, it deals with claims against a lender based specifically on the lender's construction of property after foreclosure – and such "discussion of facts" concern liens that were filed *before* title passed to the lender. In fact, the term 'merger' is nowhere to be found in that opinion.

intention was to preserve the mortgage rather than to extinguish it."
McCraney at 250, 170 S.E. at 279; citing McCreary v. Coggeshall, 74 S.C. 42, 53, S.E. 978, at 982 (1906)(emphasis added).[41]

In recognition of the firmly established, current law on merger as laid out in McCreary, McCraney, Tzouvelekas, *et al.* and in light of the common knowledge that the distinguishing factors delineated therein (as compared to the prior case of Bleckley cited by the lower court) are of central issue here, the Bank finds it equally puzzling that the lower court, in its citation to the case of First Fed. Sav. And Loan Ass'n of S. Carolina v. Finn, 300 S.C. 228, 287 S.E.2d 253 (1989)[42], chose not to cite the entire law. In its citations to the First Fed. case, the lower court cited two sentences in the case in succession as they appear in the case. **[R. p. 11]** These two sentences cite only that portion of the law promulgated in the outdated 1887 Bleckley case. The lower court failed to cite the immediately following sentence in the First Fed. Case, which, oddly enough, cites McCreary and the very heart of the current merger law: "An intention to prevent merger may be implied from facts indicating merger would be opposed to the interest of the person in whom the legal and equitable interests became united and that such an intention existed at the time of the merger. McCreary v. Coggeshall, 74 S.C. 42, 53 S.E. 978 (1906)." First Fed. at 231, 387 S.E.2d at 254.

The *actual* facts on this subject, as have been litigated at length in the Bank Lawsuit show that it was never the intention of the Bank to accept the property in exchange for the extinguishment of the $5.5+ Million debt – either before, during or after

[41] The holding in McCreary was obviously upheld by the courts of this State in the later McCraney and Owings opinions, but it was also upheld in 1945 by the Tzouvelekas opinion, where the S.C. Supreme Court stated: *"[a] merger of the lesser estate into the greater estate will not take place if such a merger would be opposed to the interest of a person in whom the different estates or interest became united."* Tzouvelekas v. Tzouvelekas, 206 S.C. 90, 33 S.E.2d 73, 75 (1945) (emphasis added).

[42] This opinion was published in 1989, not 1998 as the lower court's order indicates.

the Deed in Lieu. The Bank had absolutely no intention to agree at any time to the extinguishment of $5.5+ Million in debt based merely on the exchange of title to property that even the lower court described unfavorably on the record as "cement blocks or something there".[43] **[R. p. 581, line 5 – p. 582, line 2]** The facts, as verified in the Bank Lawsuit, make plain the Bank's express intention in this regard when just prior to the deed in lieu of foreclosure being filed by PSL it tried to get the Bank to sign a Deed in Lieu of Foreclosure Agreement (drafted by PSL) which included provisions making clear that, if signed, the Bank would be agreeing to merger. **[R. pp. 133-134]** The Bank, in writing, unequivocally rejected this attempt by PSL to have the deficiency waived. PSL then unilaterally filed the deed without any such written agreement in place. **[R. pp. 133-134]**

The undisputed facts also reveal that prior to, at the time of, and subsequent to the time when PSL filed the Deed in Lieu, PSL represented to the Bank in writing that it would be working on alternative financing to pay off the outstanding debt it still owed the Bank so that PSL could come back and finish the Project. **[R. p. 430, lines 10-14; p. 535, lines 13-25; p. 538, lines 12-15; p. 543, lines 7-13]** In fact, after the Bank received the Deed in Lieu with the knowledge that the deficiency was still outstanding, the Bank agreed to give PSL until late May 2007 to find alternative financing before the Bank filed suit against PSL for, *inter alia*, the deficiency. **[Id.]** During this time period immediately after the Deed in Lieu was filed, attorneys for PSL were in constant communication with the attorneys for the Bank. Notably, this written correspondence involved detailed discussions regarding the amounts that PSL still owed the Bank and credits due PSL

[43] This description volunteered by the lower court was based on its own first-hand account of the unfinished project which it apparently obtained from going "by this project every week from the time they started until today". **[Id.]**

(against the outstanding debt still owed to the Bank) for the value of the property deeded to the Bank, and the status of PSL's efforts to obtain independent financing to pay off the remaining debt it still owed the Bank. **[R. p. 698; p. 537, line 17 – p. 538, line 11]**

The best evidence of this understanding between PSL and the Bank is the Quitclaim Deed delivered from PSL to the Bank in July 2007 transferring The 2 Acre Tract to the Bank.[44] In exchange for this property, the Bank - like its handling of the Deed in Lieu - agreed to give PSL further credit against the outstanding deficiency in an amount representative of the appraised value of The 2 Acre Tract. **[R. p. 537, line 17 – p. 538, line 11]** There is simply no other reason this (relatively) valuable piece of property would be deeded via quitclaim to the Bank by PSL at that time.[45]

Further still, the mortgage at issue is still of record and was never satisfied by the Bank. In fact, the Bank brought suit (the Bank Lawsuit) against the debtors for the deficiency under the mortgage. Thus, there was no dispute at any time before, during, or after the Deed in Lieu regarding the fact that the Bank would be pursuing PSL for the deficiency owed by PSL to the Bank. And, likewise, there was no dispute that the Deed in Lieu did anything to change the Bank's position (or that of PSL) that the Bank could pursue the outstanding debt. In other words, neither the Bank nor PSL ever intended at any point in time surrounding the Deed in Lieu that the Deed in Lieu from PSL to the Bank would act to merge the title to the property with the debt that PSL owed the Bank. Even ignoring the obvious intentions of the Bank, the above mentioned controlling law of this State makes plain that it should be presumed the that the Bank intended the effect

[44] On page 3 of the Craft Order, the lower court referred to this deed, which is of public record in its jurisdiction. **[R. p. 24]**

[45] The 2 Acre Tract was valuable due to the fact that 13 of the 58 units were located on it. **[R. p. 676]** In addition, of the two entrances to the development, the main entrance was on The 2 Acre Tract. **[Id.]** The other entrance was on Tract B, which at the time, was in the possession of Zellner- who was claiming that Craft had trespassed onto Tract B to perform their alleged work without Zellner's permission. **[Id.]**

which is most beneficial to itself. McCraney, supra. And, in cases like the one at issue when the estate is subject to another encumbrance claim where it would be better for the Bank to preserve its lien rather than to extinguish it, "these facts may be taken as sufficient ground for inferring that [the Bank's] intention was to preserve the mortgage rather than to extinguish it." Id.

All of the circumstances and facts surrounding the Deed in Lieu clearly demonstrate – implicitly and explicitly - that merger would be opposed to the interest of the Bank at all times surrounding the Deed in Lieu. In view of the controlling law on merger, the lower court's conclusion to the contrary is in error and should be reversed.

VIII. IN LIGHT OF THE LOWER COURT'S MECHANIC'S LIEN AWARDS TO MOORHEAD AND MILLER, DID THE LOWER COURT ERR IN NOT APPLYING S.C. CODE §§ 29-5-40 and 29-5-60 IN ORDER TO PROPERLY PRORATE THE AMOUNT IT FOUND OWING TO RESPONDENT?

The lower court awarded the general contractor, Moorhead, the principal amount of $66,627.81 under Moorhead's mechanic's lien claim. **[R. p. 28]** The lower court also awarded Miller, a subcontractor like Craft, the principal amount of $111,103.13 under Miller's mechanic's lien claim. **[R. p. 43]** Here, the lower court awarded Craft $70,000.00 under its mechanic's lien claim. **[R. p. 14]**

S.C. Code Ann. § 29-5-40 provides:

> Whenever work is done or material is furnished for the improvement of real estate upon the employment of a contractor or some other person than the owner and such ... contractor ... 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(emphasis added).

S.C. Code Ann. § 29-5-60 provides:

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

S.C. Code Ann. § 29-5-60(emphasis added).

Again, one of the primary purposes of S.C. Code §§ 29-5-20 and 29-5-40 is the protection of the property owner 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. Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 93 S.E.2d 855 (1956)(emphasis added).

The total amount awarded by the lower court to Miller and Craft equals $181,103.13. Yet, the total amount awarded by the lower court to their general contractor was $66,627.81. Ignoring for the time being the fundamental issues concerning the propriety of Moorhead, Miller and Craft's lien claims, the cumulative amount awarded to the subcontractors under their mechanic's lien claims is $114,475.32 more than what the lower court awarded to the general contractor under its lien claim on the same Project. Under the plain meaning of S.C. Code Ann. §§ 29-5-40 and 29-5-60, the awards to Craft and Miller were in error. Under the statutory scheme (and, again, ignoring the other errors in the lower court's order regarding the propriety of the lien claims at issue), the lower court's order should have prorated the amounts due Craft and Miller and paid such prorated amounts out of the $66,627.81 awarded to Moorhead. Thus, the proration due Craft is 38.65% ($70,000.00 ÷ $181,103.13=0.3865, or 38.65%) of the amount found

owing under Moorhead's lien claim, or $25,752.99. Therefore, the lower court's order was in error and should be reversed.

IX. DID THE LOWER COURT ERR IN INCLUDING PRE-JUDGMENT INTEREST IN THE AMOUNT THE COURT AWARDED THE RESPONDENT AS AGAINST THE APPELLANT?

Craft made clear in the only testimony provided on its behalf that the Bank doesn't owe Craft any money on the contract because Craft never had a contract with the Bank.[46] **[R. p. 499, lines 21-24]** At the conclusion of each cause of action in its Complaint, Craft made a prayer for relief specific to each such cause of action. **[R. pp. 85-105]** While Craft specifically requested pre-judgment interest in its prayer for relief in both its Breach of Contract and Unjust Enrichment causes of action, Craft did not make a request for pre-judgment interest on its Mechanic's Lien Foreclosure cause of action. **[R. pp. 85-105]**

> S.C. Code Ann. § 34-31-20 provides in pertinent part:
>
> (A) In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum.

S.C. Code Ann. § 34-31-20. It is well settled that pre-judgment interest is not automatically applied to judgments in this State. T.W. Morton Builders, Inc., v. von Buedingen, 316 S.C. 388, 450 S.E.2d 87 (Ct. App. 1994). In South Carolina, pre-judgment interest is only appropriate on liabilities to pay money from the time when, either by agreement of the parties or operation of law, the payment was demandable, if the sum is certain. Id. "Stated another way, prejudgment interest is allowed on a claim of liquidated damages; i.e., the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties." Butler Contracting,

[46] As established *supra*, the personal judgment entered against the Bank was wholly improper, such that the prejudgment interest award added thereto by the lower court is also improper.

Inc. v. Court St., LLC, 369 S.C. 121, 133, 631 S.E.2d 252, 258-59 (2006). The proper test for determining whether pre-judgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, *is fixed by conditions existing at the time the claim arose.* Id.(emphasis added).

According to the lower court's Order, the claim against the Bank did not arise until the time when the Bank took title to the property.**[R. pp. 10-12]** The conditions existing at that time reveal that the Bank had not agreed to any amount owed Craft because the Bank had no notice of Craft's claims at that time.[47] **[R. p. 499, line 21 – p. 501, line 22]** In a number of construction-related cases, the courts of this State have denied pre-judgment interest to a builder where the builder failed under its burden at trial to establish a stated account and failed to establish that there was an agreement in place between builder and defendant regarding whether the account is a true statement due at a specific point. T.W. Morton Builders, Inc., v. von Buedingen, 316 S.C. 388, 399, 450 S.E.2d 87, 93 (Ct. App. 1994). In such cases, the defendant vigorously disputed the builder's rights to the amounts purportedly due. Id. "The essential elements of an account stated are (1) that the account is actually stated; and (2) that the parties either expressly or impliedly agreed that it is a true statement and is due to be paid then or at some other specified time." Id.(emphasis added).

As with the above referenced cases, there is nothing in the record before us that would indicate the Bank and Craft ever had an agreement regarding monies purportedly due Craft, such that the damages alleged here cannot be 'liquidated'. In fact, Craft's complete failure to explain the nature or the substance of his claimed damages further

[47] Craft even testified that it didn't even know who the Bank was prior to the Deed in Lieu. **[R. p. 501, lines 3-6]**

establishes that it was not a liquidated sum (or sum certain) that Craft was seeking. In addition, there is nothing in the record before us that proves the payment is demandable of the Bank. Further, the Bank had no knowledge of Craft's claim when it became the record owner of the property, the Bank vigorously disputed Craft's right to the amounts alleged to be due, and Craft did not otherwise prove that the Bank had entered into any agreement with Craft signifying that Craft's statement of account was true and due to be paid at a specified time.[48] In fact, the documents and testimony admitted into evidence at trial show that the underlying contract between Moorhead and Craft was terminated at least a month before the Bank became the owner of the property. Thus, an award of pre-judgment interest against the Bank is improper and should be reversed.

X. DID THE LOWER COURT ERR IN FINDING THAT THE RESPONDENT WAS THE 'PREVAILING PARTY' UNDER THIS STATE'S MECHANIC'S LIEN STATUTE?

In ruling that Craft was the prevailing party in this case, the lower court based its determination on the 1997 maritime case of Seckinger v. Vessel Excalibur, 483 S.E.2d 775, 778, 326, S.C. 382, 388 (Ct. Ap.1997). The Seckinger case is not authoritative on the issue of prevailing party. The controlling law on this issue is the 2005 version (together with the 2001 amendments) of S.C. Code Ann. § 29-5-20, and the provisions found therein defining 'prevailing party'. Lauro v. Visnapu, 351 S.C. 507, 518-519, 570 S.E.2d 551, 557 (2002).[49] Based on the more recent legislative history and judicial

[48] From a practical standpoint, the inclusion of pre-judgment interest as an award under a mechanic's lien foreclosure claim under the facts of this case does not support the legislature's intent at promoting the civil, timely resolution of mechanic's lien claims. Rather, the 8.75% pre-judgment interest rate, if applied to mechanic's lien causes of action such as the one here, becomes a fairly significant investment (especially during these economic times in the construction industry), and actually promotes lengthy, unreasonable litigation of claims - such as the case here.

[49] "If neither party made a written offer of settlement *under the pre-amended version of the statute*, § 29-5-10 would not apply, and the determination of a prevailing party would be within the sound discretion of the trial judge. *Seckinger v. Vessel Excalibur, 326, S.C. 382, 483 S.E.2d 775 (Ct. Ap.1997)*. Subsequently, the statute was amended to provide that if the defendant makes no written offer of settlement and makes a

precedent established in this State in connection with this narrow issue, it remains clear that the Bank is the prevailing party under the statute. Id.

Since the time when the Seckinger opinion was published, it has been established in South Carolina that the prevailing party is the one whose statutory settlement offer is closer to the judgment amount, and not simply the party for whom favor judgment is granted. S.C. Code Ann. § 29-5-20. In situations such as the one here where neither party makes a written offer of settlement, the defendant's statutory "offer of settlement" is deemed to be zero and the plaintiff's statutory "offer of settlement" is deemed to be the amount prayed for in its complaint. Id.; JRS Builders Inc., v. Neunsinger, 364 S.C. 596, 614 S.E.2d 629 (2005); Lauro at 518-519, 570 S.E.2d at 557.

Here, the lower court rendered judgment in the favor of Craft on its mechanic's lien claim in the amount of $70,000.00. **[R. p. 14; p. 582, line 25 – p. 583, line 20]** The amount prayed for by Craft in its un-amended mechanic's lien and un-amended Complaint was $101,536.36. **[R. pp. 67-72]** Based on any of the several reasons outlined herein that make clear that Craft's lien fails as a matter of law (meaning Craft should recover $0 on its lien claim), the Bank should be deemed the prevailing party here under controlling law.

However, assuming *arguendo* that the lower court's ruling regarding Craft's lien rights is deemed proper (and that the lower court's ruling regarding Moorhead's lien rights is also deemed proper[50]), the application of S.C. Code Ann. §§ 29-5-40 and 29-5-60 as discussed *supra*, precludes Craft from recovering more than a prorated amount of the lien amount awarded to Moorhead. S.C. Code Ann. §§ 29-5-40 and 29-5-60. This

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counterclaim, the value of his counterclaim is considered to be his negative offer of settlement. S.C. Code Ann. § 29-5-10(b) (Supp.2001)." Id.(emphasis added).

[50] See the Bank's Appeal in the Moorhead matter; Appellate Case No. 2012-213225.

prorated amount ($25,752.99) equals less than half of Craft's $101,536.36 lien amount (half being $50,768.18). Thus, the Bank should be deemed the prevailing party.

The lawsuit filed by Craft was litigated for over four (4) years. All the while, interest, the Bank's attorney's fees and costs escalated. Throughout the litigation, the amount alleged in Craft's mechanic's lien was at issue, as was the property that the lien encumbered, and the baseless breach of contract claim against the Bank. **[R. pp. 53-60]** During this time frame, Craft did not initiate any discovery, to include noticing any depositions or even serving *any* written discovery. In order to defend against the manufactured claims of the lawsuit, the Bank was forced to serve extensive discovery and notice a number of depositions. Throughout the discovery process, it remained clear that Craft did not have any legal basis for its claims against the Bank personally or against the Bank's interest in the property at issue. Despite the clarity of the facts, Craft never amended its Complaint or its lien nor did Craft otherwise dismiss any of its baseless claims. In his order on the Bank's Motion for Summary Judgment, Judge Maddox recognized the misplaced, over-reaching efforts of Craft by issuing summary judgment in favor of the Bank on Craft's bogus breach of contract claim and on the bogus lien it filed against The 38 Acre Tract.[51] **[R. pp. 53-60]**

Despite the Bank having to litigate this baseless lien claim of Craft over the course of 3.5 years and obtaining a judgment dissolving the lien on The 38 Acre Tract, the lower court did not award the Bank its attorneys' fees and costs under S.C. Code Ann. § 29-5-20. The courts of this State have made clear that a defendant to a mechanic's lien claim has the right to collect attorney fees and costs under the statute when it prevails on

[51] At no time during the time period at issue did PSL contract with anyone, including Craft, to perform any work on The 38 Acre Tract. **[R. pp. 57-58]** And, no work was ever completed by anyone on The 38 Acre Tract during the time period at issue. **[Id.]**

such a dispositive motion. Keeney's Metal Roofing, Inc. v. Palmieri, 345 S.C. 550, 554-555, 548 S.E.2d 900, 902-903 (2001). At a minimum, the Bank should have been awarded its attorneys' fees and costs in successfully defending against Craft's wrongful lien as against The 38 Acre Tract. It is illogical and patently unfair for the lower court not to take this liened parcel into account when ruling in favor of Craft when, under the same premise offered by the lower court, it would have had to take it into account if it ruled in favor of the Bank. This very type of inequity to the lien debtor is the reason the Statute was amended in 2001. Moreover, by allowing a lien creditor to hold a 38 acre tract hostage for over 3.5 years without any basis whatsoever for doing so (all the while trying to litigate/leverage its claims against 3 other unrelated properties) is exactly the inequity the legislature of this State was trying to curb when it included the prevailing party provision in the mechanic's lien statute.

For the reasons stated above, it was in error for the lower court to determine that Craft was the prevailing party under S.C. Code Ann. § 29-5-20. The lower court's ruling should be reversed and the Bank should, by law, be deemed the prevailing party.

XI. DID THE LOWER COURT ERR IN THE AMOUNT OF ATTORNEY FEES THAT IT AWARDED RESPONDENT?

The attorney fee amount of $32,000.00 that was awarded *sua sponte* by the lower court to Craft is almost 50% (fifty percent) of the $70,000.00 principal amount awarded to Craft by the lower court. **[R. p. 614, lines 1-7]** Based on the fact that Craft provided absolutely nothing to the lower court or to the Bank in support of its claim for attorney's fees, it is presumed that the lower court merely awarded the above amount based on a completely arbitrary percentage of recovery. **[R. p. 613, line 12 – p. 614, line 8]**

It is undisputed in this case that the basis of any attorney fee amount is statutory-

S.C. Code § 29-5-20. The courts of this State have recently found in cases such as this where the State statute includes a prevailing party provision for attorneys' fees that "an award of [attorney's] fees based on a percentage of the prevailing party's recovery is improper." S.C. Department of Transportation v. Revels, 399 S.C. 423, 428, 731 S.E.2d 897, 899 (Ct.App. 2012). Also, when an award of attorney fees is requested and authorized by statute, the trial court must make specific findings of fact on record as to the nature, extent, and difficulty of services rendered, time and labor devoted to case, professional standing of counsel, contingency of compensation, customary fee charged in locality, and beneficial results obtained, before awarding a specific amount of fees. Collins v. Collins, 239 S.C. 170, 122 S.E.2d 1 (1961).

Here, there were *no* specific findings of fact made on the record as to the elements delineated in Collins, such that there is *no evidence on the record* which could support the specific amount of fees awarded by the lower court. **[R. pp. 588-618]** In fact, Craft provided *absolutely nothing* to either the lower court or the Bank to evidence the attorney's fees that it allegedly incurred. **[R. pp. 588-618]** Thus, the lower court's ruling in this regard appears to be completely arbitrary, which is exactly what the courts of this State have found to be wholly improper.

Further, when other claims are contested in a lawsuit in addition to a mechanic's lien cause of action, the trial court abuses its discretion as to the amount of the attorney fees awarded under S.C. Code Ann. § 29-5-20, *et seq.*, when a finding is not made on the record as to the specific amount of time/fees spent by the prevailing counsel on just the mechanic's lien cause of action only. Utilities Const. Co., Inc. v. Wilson, 321 S.C. 244, 250, 468 S.E.2d 1, 4 (Ct. App. 1996). In other words, when a plaintiff such as the one

here asserts claims like unjust enrichment and breach of contract in addition to its mechanic's lien claim, an award of attorney fees to the plaintiff under the mechanic's lien claim must reflect the time spent only on that cause of action and not the time spent on prosecuting any of the other causes of action. Id. There were no specific findings of fact made on the record with respect to the amount of Craft's attorney's fees, to include what was actually incurred by Craft, the segregated amount incurred by Craft on just the Mechanic's Lien portion of the lawsuit, or the contractual fee arrangement that counsel for Craft entered into with Craft.[52] **[R. pp. 588-618]**

The amount of attorney's fees awarded by the lower court in this case was in error and should be reversed and remanded to the lower court for a determination of the amount of costs and attorney fees to be awarded the Bank as the prevailing party.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Honorable Court reverse the lower court and remand the case back to the lower court for a determination of an amount of attorneys' fees and costs owing to Appellant.

Respectfully submitted,

June 24th, 2013
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[52] In addition, as discussed *supra*, the Bank should have, at a minimum, been given a credit in the amount of the attorneys' fees and costs it incurred in successfully defending the wrongful lien that Moorhead filed against The 38 Acre Tract.

Certificate of Counsel

The undersigned hereby certified that Appellant's Final Brief complies with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
The Honorable Ellis B. Drew, Jr., Master-in-Equity

Case No.: 2007-CP-04-2784
(Appellate Case No. 2012-213227)

Craft Construction Company, Inc. of Starr ..... Respondent,

v.

Pendleton Station, LLC, Enterprise Bank of South Carolina,
and Angelo Penza ..... Defendants,

Of whom Enterprise Bank of South Carolina is the ..... Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Appellant's Final Brief in the above-referenced case has been served on all parties of record by mailing a copy of same in the United States mail, postage prepaid this 25th day of June, 2013, addressed as follows:

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