THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

James C. Williams, Jr., Special Referee

Case No. 2010-CP-40-8621

C.R. Meyer and Sons Company, ... Plaintiff,

v.

Custom Mechanical CSRA, LLC ..... Defendant.

And

Custom Mechanical CSRA, LLC is ..... Respondent,

v.

Plumbers & Steam Fitters Local #150 Health and Welfare Fund; Plumbers & Steam Fitters Local #150 Pension Fund; Plumbers & Steam Fitters Local #150 Annuity Fund, and Jackie K. Nordeen, Jr. and Patrick H.F. Smith, IV, as Trustees of these Funds; Plumbers & Steam Fitters Local #150 Vacation Fund and Patrick H. F. Smith, IV and Joseph L. Dozier, as Trustees of this Fund; Augusta Joint Apprenticeship and Journeymen Training Committee, and Patrick H.F. Smith, IV and Charles I. Hardigree, as Trustees of this Fund; Trustees of Southern Iron Workers Pension Fund; Trustees of Southeastern Iron Workers Healthcare Plan; Trustees of Southeastern Iron Workers #709 Joint Apprenticeship and Training committee and Local #709, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers; Southeastern Carpenters and Millwrights Health Trust, Southeastern Carpenters and Millwrights Pension Trust, Larry Phillips and J. Kirk Malone, as Trustees of these Funds; Ferguson Enterprises, Inc.; Presidential Financial Corporation; Norton Welding Supply, Inc.; United Rentals (North America), Inc.; Daniel R. Friedmann; Tony Hall; Timothy R. Hall, Jr.; Ralph D. Black; Thomas Brittingham; Arthur C. Carlson; Leonard Wade Cliett; Christopher Cullipher; David W. Cullipher; Joseph A. Doyle, Jr.; Charles R. Ellzey; Brian Field; Clayton W. Googe, Jr.;

Martin Granger; William R. Giffin, Jr.; Jack E. Hegler; George G. Lever; Matt Lever; Ernest H. Lewis, III; the Estate of William R. McFerrin by and through its duly-appointed Executrix, Nancy McFerrin; Daniel Nichols; Kinda Phommachanh; Raleigh B. Roye; Nicholas Stewart; Timothy P. Stock; James Waltemath; Al Tiska; Al Carpenter; Bruce Pollock, Jr.; and, Security Federal Bank, ... Third Party Defendants,

Of Whom
Daniel R. Friedmann; Tony Hall; Timothy R. Hall, Jr.; Ralph D. Black; Thomas Brittingham; Arthur C. Carlson; Leonard Wade Cliett; Christopher Cullipher; David W. Cullipher; Joseph A. Doyle, Jr.; Charles R. Ellzey; Brian Field; Clayton W. Googe, Jr.; Martin Granger; William R. Giffin, Jr.; Jack E. Hegler; George G. Lever; Matt Lever; Ernest H. Lewis, III; the Estate of William R. McFerrin by and through its duly-appointed Executrix, Nancy McFerrin; Daniel Nichols; Kinda Phommachanh; Raleigh B. Roye; Nicholas Stewart; Timothy P. Stock; James Waltemath; Al Tiska; Al Carpenter; and Bruce Pollock, Jr. are ..... Appellants,

And Presidential Financial and Security
Federal Bank, ... are also Respondents.

BRIEF OF APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

I. Did the circuit court err in granting summary judgment for Respondents on the basis that S.C. Code Ann. § 29-7-10 did not operate to create a statutory lien in favor of Appellants in the funds paid from the arbitration between C.R. Meyer and Custom Mechanical on the basis that:

A. Appellants were employees of Custom Industrial, not Custom Mechanical, and the funds to which Appellants seek to attach the lien were paid to Custom Mechanical, not Custom Industrial, a separate legal entity;

B. The funds were not paid to Custom Mechanical pursuant to its contract with C.R. Meyer, but were, instead, paid into the trust account of lawyers who represented Custom Mechanical;

C. The unpaid vacation funds to which Appellants alleged they were entitled were owed to the Union, the Union's claim for the unpaid vacation funds was already litigated and resolved, and Appellants did not have an independent claim to the funds?

II. Did the circuit court err in applying a strict rule of construction to S.C. Code Ann. § 29-7-10 rather than a liberal construction required of remedial statutes?

III. Did the Circuit Court Err in Failing to Consider the Custom Employees' Rights under the Payment of Wages Act and Declaring the Custom Employees' Recovery under the Act to Be Limited to "Such Actual Damages as Could be Proven"?

STATEMENT OF THE CASE

In 2006 and 2007, Custom Mechanical CSRA, LLC through its wholly-owned subsidiary Custom Industrial Services, LLC (herein after collectively referred to as "Custom") employed the twenty-nine Appellants as plumbers, pipefitters, and welders to lay two stories of underground pipe as well as in-wall, internal, and external pipe for a facility built to house a giant, multi-story, toilet-tissue making machine at the Kimberly-Clark plant at Beech Island, South Carolina. (R. p.195, ¶ 38, R. p.196, ¶ 43; R. p.204, ¶ 12, R. p.208, ¶ 43). These twenty-nine employees included the following (herein after collectively referred to as "Custom Employees"): Daniel R. Friedmann; Tony Hall; Timothy R. Hall, Jr.; Ralph D. Black; Thomas Brittingham; Arthur C. Carlson; Leonard Wade Cliett; Christopher Cullipher; David W. Cullipher; Joseph A. Doyle, Jr.; Charles R. Ellzey; Brian Field; Clayton W. Googe, Jr.; Martin Granger; William R. Giffin, Jr.; Jack E. Hegler; George G. Lever; Matt Lever; Ernest H. Lewis, III; the Estate of William R. McFerrin by and through its duly-appointed Executrix, Nancy McFerrin; Daniel Nichols; Kinda Phommachanh; Raleigh B. Roye; Nicholas Stewart; Timothy P. Stock; James Waltemath; Al Tiska; Al Carpenter; and Bruce Pollock, Jr. Upon their initial employment, each Custom Employee was provided the opportunity to participate in a voluntary payroll deduction vacation/holiday savings fund, wherein the employee would choose to have either five, ten, or fifteen percent of their weekly wages withheld by Custom. (R. p.196, ¶¶ 44, 46; R. p.205, ¶¶ 18, 20). The withheld amounts, consisting entirely of employee-earned wages, were to be paid monthly to the local pipefitters' union so that the union could then cut checks to the Custom Employees and their coworkers

during the summer and Christmas holiday. (R. p.196, ¶¶ 47, 48; R. p.205, ¶¶ 21, 22). Around May 2007, Custom began laying off employees, terminating each Custom Employee without cause by the year's end. (R. p.196, ¶¶ 49, 50; R. p.205, ¶¶ 23, 24). When Custom did not pay the Custom Employees their wages withheld in the vacation/holiday savings plan when due, the Custom Employees sued Custom in a lawsuit styled as "Friedmann, et al. v. Custom Industrial Services, LLC, Custom Mechanical CSRA, LLC, Custom Mechanical CSRA, Inc., et al., " C/A No: 2008-CP-02-413 (hereinafter "Friedmann case"). After years of litigation, by Confession of Judgment entered on February 14, 2011, Custom Mechanical and its sister companies confessed judgment to the Custom Employees in the amount of Two-Hundred Seventy-five Thousand and no/100 ($275,000.00) Dollars for vacation pay wrongfully withheld. (R. p.484).

In the interim, Custom retained counsel on an hourly basis to sue the general contractor on the Kimberly-Clark project, C.R. Meyer and Sons Company ("C.R. Meyer"), for failing to pay Custom all monies due by contract. In July 2007, C.R. Meyer made a demand for arbitration of the contract dispute. Arbitration was held in September 2010. The Arbitration Panel found that C.R. Meyer had "materially breached the seven subcontracts with Custom." (R. p. 479). The Arbitration Panel determined that Custom was entitled to recover from C.R. Meyer, "the reasonable value of work performed by Custom on all seven subcontracts, including reasonable overhead and profit (less prior payments), and Custom's reasonable attorneys fees." (R. pp. 479-480). On November 8, 2010, the Arbitration Panel entered an award in favor of Custom Mechanical against C.R.

Meyer in the amount of $1,976,548.00, which included an award of $200,000 in attorney's fees and legal expenses to Custom Mechanical's legal team. C.R. Meyer sought judicial review of the award and on November 1, 2011, the circuit court entered an order confirming the arbitration award. (R. p.1).

On February 2, 2011, the Friedmann case trial court issued a Warrant of Attachment commanding law enforcement to attach and seize so much of the proceeds of the $1,976,548.00 Arbitration Award as was needed to secure the Custom Employees' judgment. (R. p.489).

On March 5, 2012, the circuit court entered an order memorializing a settlement between C.R. Meyer and Custom Mechanical. The order noted the parties agreed that C.R. Meyer will pay $2 million to Custom Mechanical, and the funds will be transferred into an escrow account of the law firm of Richardson Plowden & Robinson, PA, which represented Custom Mechanical in the dispute. (R. p.24, ¶ 1). The order provided that the law firm would maintain the funds in escrow pending resolution of any claims asserted by third party defendants. (R. p.25, ¶ 3). The Custom Employees were among the third parties who consented to the order.

Custom Mechanical had filed a Third-party Complaint in February 2011 and added all known judgment creditors of Custom Mechanical as third-party defendants including the Custom Employees. In July 2012, Security Federal Bank and Presidential Financial Corporation (the "Banks") filed counterclaims against the Custom entities and a Third-party Complaint against Appellants (the "Custom Employees"). On August 1, 2012, the Custom Employees filed a response to the Third-party Complaint raising

defenses, counterclaims, and a cross-claim that asserted entitlement to some of the money held in escrow by Custom's lawyers. The Banks filed a response in August 2012.

On October 12, 2012, the Banks filed a joint motion for summary judgment, asserting priority to the funds being held in escrow. On October 19, 2012, the Custom Employees filed a cross-motion for summary judgment. That same date, the Banks moved to disburse all funds not in dispute. The circuit court entered an order on November 13, 2012, granting the motion to disburse all funds not in dispute, leaving $325,000 in trust. On November 15, 2012, the Banks filed an amended motion for summary judgment. On December 3, 2012, Custom Employees filed an amended cross-motion for summary judgment. In January 2013, both sides filed memoranda in support of their motions.

On March 19, 2013, the circuit court held a hearing on the cross-motions for summary judgment. On May 30, 2013 the court entered an order granting the Banks' motion for summary judgment and denying the motion filed by the Custom Employees. On June 7, 2013, the Custom Employees moved the circuit court to reconsider its order. On July 16, 2013, the circuit court entered an order denying the motion for reconsideration.

This appeal follows.

FACTS

This matter was before the court below on cross-motions for summary judgment. The basic facts are not in dispute, and the case presents a question of statutory construction in light of those facts. *See Alltel Communications, Inc. v. South Carolina Dept. of Revenue*, 399 S.C. 313, 319 n. 2, 731 S.E.2d 869, 872 n. 2 (2012) (cross-motions for summary judgment indicate the parties' belief that further development of the facts is unnecessary and authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties). However, as to any factual disputes, summary judgment is inappropriate in cases applying the preponderance of the evidence burden of proof if the non-moving party submits a mere scintilla of evidence. *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 734 S.E.2d 161 (2012).

Background

From 2005 through 2007, C.R. Meyer was the general contractor on a project for Kimberly-Clark for a facility to house a giant, multi-story, toilet tissue manufacturing machine in Beech Island, South Carolina. C.R. Meyer selected Custom Mechanical CSRA ("Custom Mechanical") as a subcontractor who would be responsible for laying two stories of underground pipe as well as in-wall, internal, and external pipe for the project. Custom Mechanical provided all labor for the project through its wholly-owned subsidiary, Custom Industrial Services ("Custom Industrial"; entities jointly referred to as "Custom"). Custom and C.R. Meyer entered into seven separate contracts covering services for the project.

In 2006 and 2007, Custom Mechanical borrowed sums from two lenders, Security Federal Bank and Presidential Financial Corporation (the "Banks"), and gave as security its accounts receivable from C.R. Meyer as follows:

Lender	Amount	Debtor	Security
Security Fed. Bank	$2,151,594.00	Custom Mechanical	Accounts receivable from C.R. Meyer to Custom Mechanical
Presidential Fin Corp.	$1,250,000.00	Custom Mechanical	

In 2006 and 2007, Custom employed the twenty-nine Appellants as plumbers, pipefitters, and welders (hereinafter "Custom Employees"). Each Custom Employee was provided the opportunity at their initial employment to participate in a voluntary payroll deduction vacation/holiday savings fund by having Custom withhold either five, ten or fifteen percent of their weekly wages. (R. p.196, ¶¶ 44, 46; R. p.205, ¶¶ 18, 20). These withheld amounts (consisting entirely of employee-earned wages) were to be paid monthly to the appropriate local labor union, and the union would issue checks to the Custom Employees and their co-workers during the summer and Christmas holidays. (R. p.196, ¶¶ 47, 48; R. p.205, ¶¶ 21, 22).

The Custom Employees provided skilled labor for the Kimberly-Clark project. (R. p.195, ¶ 38; R. p.196, ¶ 43; R. p.204, ¶ 12; R. p.208, ¶ 43). About May 2007, Custom began laying off employees, terminating each Custom Employee without cause by the year's end. (R. p.196, ¶¶ 49, 50; R. p.205, ¶¶ 23, 24). Custom failed to pay the final withheld amounts to the appropriate local union, leaving the union without funds to disburse to the Custom Employees. This has prevented the Custom Employees from

receiving the wages Custom owed them for the last six-plus years. (R. p.196, ¶¶ 51, 52; R. p.206, ¶¶ 25, 29).

Custom hired counsel to sue C.R. Meyer for allegedly failing to pay Custom all funds due under the contract. (R. p. 479). On November 8, 2010, an Arbitration Panel found that C.R. Meyer had "materially breached" its subcontracts with Custom and determined that Custom was entitled to recover from C.R. Meyer "the reasonable value of work performed by Custom on all seven subcontracts, including reasonable overhead and profit (less prior payments), and Custom's reasonable attorneys fees." (R. pp.479-480). The Panel issued an award for Custom against C.R. Meyer for $1,976,548.00, which included $200,000.00 for attorneys fees and costs. (R. p.481).

On February 2, 2011, the circuit court issued a warrant of attachment ordering the Sheriff to seize so much of the proceeds of the $1,976,548.00 arbitration award against C.R. Meyer in favor of Custom "as will secure the sum of $275,000.00...." (R. p.489). On February 14, 2011, Custom Mechanical and its sister companies confessed judgment to the Custom Employees in the amount of $275,000.00 for the vacation pay that was wrongfully withheld. (R. p.484).

The circuit court confirmed the Arbitration Panel's award on November 1, 2011. C.R. Meyer then agreed to settle its liability to Custom and paid $1.8 million into the trust account of Custom's lawyers to be held for the benefit of the creditors until the court determined their priority.

This Dispute

The current dispute is between the Custom Employees and the Banks over rights to the funds remaining from the arbitration. The circuit court released all but $325,000.00 to the Banks. (R. p.38). The Banks brought a declaratory judgment action, alleging a priority interest over all other liens of any other entity, including the Custom Employees. The Custom Employees answered, cross-claimed, and counterclaimed; asserting a first-priority lien pursuant to Section 29-7-10 of the South Carolina Code in the amount of $275,000.00 and seeking prejudgment interest and costs, including attorney's fees.

Circuit Court's Ruling

Following discovery, both sides moved for summary judgment. The circuit court granted the Banks' motion, finding:

1. The Custom Employees did not contest that the Banks had recorded first liens.
2. Pursuant to S.C. Code Ann. § 36-9-317, *et seq.*, the Banks' perfected security interests must take priority unless S.C. Code Ann. § 29-7-10 operates to establish a statutory lien in favor of the Custom Employees.
3. The Custom Employees were "laborers" who were involved in the "erection, alteration, or repairing of buildings" under Section 29-7-10.
4. Section 29-7-10 does not establish a lien for the Custom Employees for the following reasons:
   A. The Custom Employees were employed by Custom Industrial and not by Custom Mechanical. It was Custom Mechanical that was a party to the

litigation and who received the funds pursuant to the arbitration award between Custom Mechanical and C.R. Meyer. The Custom Employees were not entitled to monies awarded to Custom Mechanical, a separate entity. (R. p.47)

B. A lien under Section 29-7-10 only attaches if Custom Mechanical was paid pursuant to its contract with C.R. Meyer. No money has come into the hands of Custom Mechanical. Instead, the money was ordered by the Court to be paid into the trust account of Custom Mechanical's attorney for the benefit of the creditors. Section 29-7-10 must be strictly construed, and accordingly, by operation of law, a lien under Section 29-7-10 does not attach for the benefit of the Custom Employees.

C. The unpaid vacation funds to which the Custom Employees claim entitlement were owed to the employees' union, the Plumbers & Steamfitters Local #150. A claim by the union for the unpaid vacation funds has already been litigated and resolved. The Custom Employees do not have an independent claim.

The Court added in a footnote, "Even if a lien under S.C. Code Ann. § 29-7-10 had attached in this case, the Court would only award such actual damages as could be proven." (R. p.47, n. 1).

The Custom Employees moved the Court to reconsider its rulings. (R. p.411). The Court denied the motion and this appeal follows.

ARGUMENTS

I.

THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR RESPONDENTS ON THE BASIS THAT S.C. CODE ANN. § 29-7-10 DID NOT OPERATE TO CREATE A STATUTORY LIEN IN FAVOR OF APPELLANTS IN THE FUNDS PAID FROM THE ARBITRATION BETWEEN C.R. MEYER AND CUSTOM MECHANICAL

At the heart of this case is the interpretation of Section 29-7-10 and its application to the facts of this case. Questions of statutory interpretation are questions of law, which the appellate court is free to decide without any deference to the trial court. *Centex Intern., Inc. v. South Carolina Dep't of Revenue*, 406 S.C. 132, 750 S.E.2d 65 (2013). The Custom Employees assert that the circuit court erroneously applied Section 29-7-10 and its ruling should be reversed.

A. THE COURT ERRONEOUSLY HELD THAT CUSTOM EMPLOYEES WERE EMPLOYEES OF CUSTOM INDUSTRIAL, NOT CUSTOM MECHANICAL, AND THE FUNDS TO WHICH THE CUSTOM EMPLOYEES SOUGHT TO ATTACH THE LIEN WERE PAID TO CUSTOM MECHANICAL, NOT CUSTOM INDUSTRIAL, A SEPARATE LEGAL ENTITY

The circuit court held that the Custom Employees were not considered employees of Custom Mechanical because they were employees of a separate legal entity, Custom Industrial. The Court should reverse this ruling.

Section 29-7-10 provides:

> **Contractors and subcontractors to pay laborers and others out of money received; laborers' lien.** Any contractor or subcontractor in the erection, alteration, or repairing of buildings in this State shall pay all laborers, subcontractors, and materialmen for their lawful services and material furnished out of the money received for the erection, alteration, or repairs of buildings upon which such laborers, subcontractors, and materialmen are employed or interested and such laborers, as well as all

> subcontractors and persons who shall furnish material for any such building, shall have a first lien on the money received by such contractor for the erection, alteration, or repair of such building in proportion to the amount of their respective claims. Any person providing private security guard services at the site of the building during its erection, alteration, or repair shall be deemed to be a laborer within the meaning of this section. Nothing herein contained shall make the owner of the building responsible in any way and nothing contained in this section shall be construed to prevent any contractor or subcontractor from borrowing money on any such contract. "Person" as used in this section shall mean any individual, corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, or other such entity.

S.C. Code Ann. § 29-7-10 (Supp. 2012) (emphasis added).

To begin with, the Legislature used the term "laborer" instead of the word "employee" in Section 29-7-10. The term "laborer" is broader than the term "employee." "Laborer" is not defined in the statute; thus, this Court should give the word its ordinary and customary meaning. *Centex Intern., Inc. v. South Carolina Dept. of Revenue*, 406 S.C. 132, 750 S.E.2d 65 (2013) (undefined terms in a statute given plain and ordinary meaning); *Murphy v. South Carolina Dept. of Health and Env'l Control*, 396 S.C. 633, 723 S.E.2d 191 (2012) (court interprets an undefined term in accordance with its usual and customary meaning).

Ordinarily, the word "laborer" denotes anyone who provides manpower to the project, whether a direct employee of the contractor, an employee of a subcontractor, a statutory employee, a borrowed servant, a temporary employee, or an independent contractor, and whether they are union or non-union. *Cf. Walsh v. International Fidelity Ins. Co.*, 55 Misc.2d 565, 285 N.Y.S.2d 327 (N.Y. City Civ. Ct. 1967) (whether someone is a "laborer" is determined not by labels but by the character of his services); *Dodd v.*

Horan, 121 So. 323 (La. App. 2 Cir. 1929) (term "laborer" as used in lien statutes includes all mechanics, laborers, and operatives who have performed labor in the construction of the project). *See also* Black's Law Dictionary 952 (9th ed. 2009) ("laborer" means "a person who makes a living by physical labor"); Merriam-Webster.com. (Merriam-Webster, n.d. Web. 31 Dec. 2013) http://www.merriam-webster.com/dictionary/laborer ("laborer" means a person who does hard physical work for money). The Custom Employees fall within the customary and ordinary meaning of "laborer" under the statute, and within the class of persons the General Assembly sought to protect by enacting Section 29-7-10. It does not matter whether they are employed by Custom Industrial, Custom Mechanical, or whether they are shared employees of both. It is undisputed that the Custom Employees provided the plumbing and pipefitting labor that Custom Mechanical contracted to provide for the General Contractor on the Kimberly-Clark project.

Furthermore, in this case, there is an amalgamation of interests between the Custom entities. *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011) (amalgamation exists where there is a blurred identity of entities). For instance, in *Kincaid v. Landing Development Corp.*, 289 S.C. 89, 91, 344 S.E.2d 869, 871 (Ct. App.1986), three related corporations (a development corporation, a management corporation, and a construction corporation) were sued for negligent construction and breach of warranty. The management corporation argued that the court should have directed a verdict in its favor because it was merely the marketing and sales company. *Id.* at 96, 344 S.E.2d at 874. In addition to sharing owners, the three companies shared a

location. *Id.* Furthermore, the management company was the corporation called to remedy problems. *Id.* Finally, the company's letterhead identified the management company as "A Development, Construction, Sales, and Property Management Company." *Id.* This court affirmed the trial court's finding that the evidence revealed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." *Id.* (quoting the trial court); see *Mid–South Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597–605, 649 S.E.2d 135, 140–44 (Ct. App.2007) (discussing *Kincaid* as one of three theories raised for holding a parent corporation liable in place of a subsidiary: (1) piercing the corporate veil; (2) alter-ego or instrumentality theory; and (3) the amalgamation of interests or blurred identity theory).

In this case, there are similar indicia of an amalgamation of interests between Custom Mechanical and Custom Industrial. Danny L. Key was the managing member of all three entities – Custom Industrial Services, LLC, Custom Mechanical CSRA, LLC and Custom Mechanical CSRA, Inc. (R. p.484). Lisa Marie Glevenyak performed all accounting work for Custom Mechanical CSRA, LLC and for Custom Industrial Services, LLC. (R. p.493). According to the Secretary of State's office, Mr. Key was the registered agent for both Custom Mechanical CSRA, LLC and for Custom Industrial. (R. p.631).

This Court should reverse the ruling that the Custom Employees may not assert the statutory lien because they were employees of a separate legal entity. The statute grant a lien to "laborers," and the Custom Employees qualify as such.

B. THE COURT ERRONEOUSLY HELD THAT THE LIEN DID NOT ATTACH BECAUSE THE FUNDS WERE NOT PAID TO CUSTOM MECHANICAL PURSUANT TO ITS CONTRACT WITH C.R. MEYER, BUT WERE, INSTEAD, PAID INTO THE TRUST ACCOUNT OF LAWYERS WHO REPRESENTED CUSTOM MECHANICAL

The circuit court found that even if the Custom Employees could fall under the statute, there was no first priority lien because Custom Mechanical never received the payments under the arbitration award. This Court should reverse that ruling.

The statute at issue in this case provides:

> **Contractors and subcontractors to pay laborers and others out of money received; laborers' lien.** Any contractor or subcontractor in the erection, alteration, or repairing of buildings in this State shall pay all laborers, subcontractors, and materialmen for their lawful services and material furnished out of the money received for the erection, alteration, or repairs of buildings upon which such laborers, subcontractors, and materialmen are employed or interested and such laborers, as well as all subcontractors and persons who shall furnish material for any such building, *shall have a first lien on the money received by such contractor* for the erection, alteration, or repair of such building in proportion to the amount of their respective claims. * * *

S.C. Code Ann. § 29-7-10 (1991) (emphasis added). In ruling that any lien under Section 29-7-10 would not have attached because Custom was never "paid" as contemplated by the statute, the circuit court relied primarily upon three cases: *Poinsett Construction Co. v. Fischer*, 301 S.C. 343, 391 S.E.2d 875 (Ct. App. 1990); *Morgan & Austin v. D.W. Alderman & Sons Co.*, 70 S.C. 462, 50 S.E. 26 (1905); and *Bellsouth Telecommunications Inc. v. Dekalb Concrete Products Inc.*, 1995 WL 578191 (D.S.C. 1995). (R. p.47). Each of these cases, however, is distinct from this case in a meaningful way or actually supports the Custom Employees' arguments.

In *Poinsett*, the general contractor (Install) gave SCNB a security interest in its

accounts receivable. The bank perfected its security interest and assigned it to Fischer. Install employed Poinsett, a subcontractor, to perform work on a construction project, and Poinsett performed the work. Install was paid in full under the general contract but did not pay Poinsett in full. Poinsett obtained a judgment against Install. Poinsett then brought an action against Fischer, alleging it had a statutory lien on the funds which Install received on the general contract and that its lien was a first lien. Fischer argued that because the security interest assigned to her was perfected before Poinsett's statutory lien came into existence, the security interest was entitled to priority over the lien. The circuit court granted summary judgment for Fischer and Poinsett appealed.

The Court of Appeals reversed. The Court first found Section 29-7-10 controlled and stated:

> When the Legislature provided that the lien granted [to] subcontractors is a first lien, we must conclude that the Legislature meant what it said. Therefore, we hold that Poinsett's statutory lien is a first lien and, thus, has priority over the security interest which Install gave the bank and the bank assigned to Ms. Fischer.

301 S.C. at 344-345, 391 S.E.2d at 876. Hence, *Poinsett* actually supports the Custom Employees' contention and stands contrary to the circuit court's ruling.

The second case, *Bellsouth*, also does not support the ruling below. Bellsouth and Kelly Green, Inc. entered into a contract under which Kelly Green buried underground telephone cables and constructed manholes. Kelly Green subcontracted some of the work to Dekalb Concrete Products, Inc. Kelly Green then failed to pay Dekalb for work performed, failed to pay the IRS various employment related taxes, and failed to pay King & Vernon, PA, for legal services rendered. Dekalb then notified Bellsouth that Kelly

Green had not paid $8,871.00 under its subcontract, and Bellsouth withheld that amount (which was the remainder due to Kelly Green under the general contract). The three parties – Dekalb, King & Vernon, and the IRS – each made claims to Bellsouth for the money being withheld. Bellsouth then brought an interpleader action and tendered the sum to the clerk. Each of the claims exceeded the amount Bellsouth paid into the court. The only issue was which claim had priority to the entire amount of the funds.

The district court held that King & Vernon's perfected security interest (obtained in 1994) was junior to the IRS lien, which was perfected in 1993. Dekalb obtained its judgment in 1994, so its lien was also junior in time to the IRS lien. Dekalb instead sought to assert a first priority lien under Section 29-7-10.

The district court noted "Unlike the traditional mechanic's lien (S.C. Code Ann. § 29-5-10, *et seq.*), the statutory lien relied upon by Dekalb in this case does not explicitly require the subcontractor to file or serve a notice of its lien in order to be accorded priority as against adverse claimants to the same money." Slip Op. at 3. Dekalb argued it should be entitled to a lien for at least the amount of materials it provided for the project. The district court disagreed, stating:

> The court is constrained, by South Carolina law, to reject this argument for two reasons. First, it has been held by the courts of South Carolina that the statutory lien created by Section 29-7-10 does not come into existence until the contractor has received the money. *Morgan & Alston v. D.W. Alderman & Sons Co.*, 50 S.E. 26 (S.C. 1905). *In this case, the funds have never come into the possession of Kelly Green. To the contrary, they have been held by Southern Bell pending a resolution of this dispute.*
>
> Secondly, and perhaps more importantly, Section 29-7-10 provides a lien on money received by a contractor 'for the erection, alteration or

> repair of [a] *building*.' (emphasis added). The work that Dekalb performed for Kelly Green did not involve the erection of a building. It involved buying underground telecommunications wires, with occasional manholes at appropriate junction points. Dekalb relies primarily upon decisions from other jurisdictions that construed the term 'building' rather broadly. With commendable candor, counsel for Dekalb conceded at oral argument that these cases from other jurisdictions involved the concept of 'building' in other contexts; none of them involved the interpretation of a statute identical, or even similar, to the statute being construed here.
>
> Moreover, the courts of South Carolina have quite clearly stated that Section 29-7-10 'must be strictly construed.' *Morgan & Alston*, 50 S.E. 26 at 27. See also [*Poinsett*] *Constr. Co. v. Fischer*, 391 S.E.2d 875 (S.C. App.1990) (rejecting a public policy argument for loosely construing Section 29-7-10 and stating 'this court [does not] have the authority to construe a statute based on its own notion of whether the statutory scheme is a good idea.'). Thus, the court must, in this case, read the term 'building' literally, and for this reason the statutory lien has no application to the materials related to underground telecommunications equipment furnished by Dekalb.

Slip Op. at 3 (emphasis added). Unlike the facts of *Bellsouth*, the funds in this case were not held by the paying party, C.R. Meyer, but were in fact delivered to Custom's agent, its law firm. *See Koutsogiannis v. BB & T*, 365 S.C. 145, 616 S.E.2d 425 (2005) (attorney is agent of client for acts done within the scope of representation of client).

The third case, *Morgan & Austin*, similarly does not support the circuit court's ruling in this case. In *Morgan*, Clark & Bennyfield were builders and contractors and entered into a contract with Revis to erect a cottage for $465. The contract provided that all payments were to be made to Clark, who was responsible for all material and labor. Revis owed a balance of $255 on the contract when he was served with a warrant of attachment in a case brought by D.W. Alderson & Sons against Clark and Bennyfield for materials sold to Clark & Bennyfield. Only about $10 of the materials were used in the

Revis project. Revis paid the $255 over to the sheriff. D.W. Alderson obtained a default judgment against Clark & Bennyfield for $400. The $255 in the hands of the sheriff were the only source of payment.

Morgan and Austin sold builders' materials to Clark & Bennyfield in the amount of $148.83 – those materials were used in the Revis project. Morgan and Austin sued Clark & Bennyfield and joined D.W. Alderman to have the court declare that D.W. Alderman had no lien on the fund, but that Morgan and Austin had a prior lien under the predecessor to Section 29-7-10. The circuit court confirmed a master's report which adjudged that D.W. Alderman had no lien and that Morgan and Austin had a prior lien under the statute.

D.W. Alderman appealed and the Supreme Court reversed. The Court stated:

> Conceding, for the purpose of this case, that the act of 1896 gives to materialmen a lien enforceable in a civil action, we do not think plaintiffs have established any lien upon the money in question. By the terms of the act, no lien can exist until the contractor has received the money. The statute creating such lien must be strictly construed. The lien is not given upon the money in the hands of the owner, which the contractor is entitled to receive, for the owner is expressly exempt from any responsibility whatever, but the lien is upon the money in the hands of the contractor. This condition has not arisen in this case, as the money has never been in the hands of the contractor, but was received from Revis by the sheriff by virtue of the attachment. Having no lien upon the money in the hands of the sheriff, plaintiffs have no status with respect to the money realized by the attachment, and now applicable to defendant's judgment.

70 S.C. at 465, 50 S.E. at 27. Thus, because the owner (Revis) never paid the funds to the contractor (Clark & Bennyfield) but instead turned the funds over to the sheriff, D.W. Alderman never had a statutory lien in the funds.

In this case, however, the owner (Kimberly-Clark) paid the funds to the

contractor, C.R. Meyer, who then paid the funds to the subcontractor, Custom Mechanical, although the money was actually paid to the law firm acting as the agent for Custom Mechanical. Once Custom Mechanical's agent received the funds, the statutory lien attached and created a first priority lien in the Custom Employees.

As noted, Custom's lawyers were its agents. *Koutsogiannis v. BB & T*, 365 S.C. 145, 616 S.E.2d 425 (2005) (attorney is agent of client for acts done within the scope of representation of client). The fact that the funds were placed in the lawyers' escrow account did not change the ownership of those funds (*i.e.*, payment on behalf of Custom to settle C.R. Meyer's debt under the arbitration award). As the Supreme Court has stated:

> [I]t is a well-settled principle of law that an agent cannot deny his principal's title. In *Mecham on Agency*, § 525, it is said: "It is a general principle in the law of agency that the agent may not dispute his principal's title. Having assumed the performance of the agency by virtue of which he has received the property or money of his principal, he will not be permitted, when called upon by his principal to account for the property or money so received, to deny his principal's title to it. This general principle, however, is subject to certain exceptions as well settled as the principle itself. It is always competent for the agent to show in his own defense that he has been divested of the property by a title paramount to that of his principal. He may also show that since delivery to him the title of his principal has been terminated or that the principal has transferred his interest or title to another under whom the agent claims."

Ocean Forest Co. v. Woodside, 184 S.C. 428, 439-440, 192 S.E. 413, 418-419 (1937). *Accord Kren v. Rubin*, 61 N.W.2d 9, 13 (Mi. 1953) ("An agent's duty to his principal forbids him, when called upon to account for property of funds received by him from his principal or on his account, from disputing his principal's right or title thereto."); *Courts v. Jones*, 8 S.E.2d 178 (Ga. Ct. App. 1940) ("As a general rule an agent's duty to his principal prevents him, when called upon to account for property or funds received by

him for the account of his principal, from disputing his principal's right or title thereto."). When the funds were paid over to Custom's lawyers to be held in a trust account, those lawyers were acting as Custom's agent and were protecting the property of their client, Custom. *Cf.* Rule 1.15, RPC, Rule 407, SCACR (setting forth a lawyer's duties with regard to property of clients that come into the lawyer's possession).

Furthermore, placing the funds in the escrow account of Custom's attorneys was a course of action that all agreed upon because of the apprehension over letting Custom obtain actual possession of the money, given its perilous financial condition and the existence of the warrant of attachment. It is disingenuous for the Banks to claim that the lien did not attach because Custom never had physical custody of the money. This Court should hold under the facts of this case that the payment was "money received by" Custom to which the first priority lien held by the Custom Employees attached pursuant to Section 29-7-10.

The plain language of the statute provides a first priority lien in favor of the Custom Employees in the funds remaining in escrow. These funds represent unpaid wages the Custom Employees are due. As the circuit court found, the Custom Employees were "laborers" who were involved in the "erection, alteration, or repairing of buildings" as contemplated by Section 29-7-10. The funds that C.R. Meyer paid to Custom in settling the arbitration award were funds received by C.R. Meyer through its agents, Richardson Plowden & Robinson, PA.

This Court should reverse the circuit court's ruling to the contrary and should hold the statute provides a lien in favor of the Custom Employees to the funds held in escrow.

C. THE COURT ERRONEOUSLY RULED THAT THE UNPAID VACATION FUNDS TO WHICH THE CUSTOM EMPLOYEES ALLEGED THEY WERE ENTITLED WERE OWED TO THE UNION, THE UNION'S CLAIM FOR THE UNPAID VACATION FUNDS WAS ALREADY LITIGATED AND RESOLVED, AND THE CUSTOM EMPLOYEES DID NOT HAVE AN INDEPENDENT CLAIM TO THE FUNDS

The circuit court stated:

> The unpaid vacation funds that the Custom Employees allege they are entitled to were owed to the employees' union, the Plumbers & Steamfitters #150. A claim by the union for the unpaid vacation funds has already been litigated and resolved. The Custom Employees do not have an independent claim.

(R. pp.47-48). The Court should reverse this ruling.

As previously noted, upon their initial employment, each Custom Employee was provided the opportunity to participate in the voluntary payroll deduction vacation/ holiday savings fund, through which each employee would choose to have five, ten or fifteen percent of his or her weekly wages withheld by Custom. (R. p.196, ¶¶ 44, 46; R. p.205, ¶¶ 18, 20). These withheld amounts, consisting entirely of employee-earned wages, were to be paid monthly to the appropriate local union so that the union could then cut checks to the Custom Employees and their coworkers during the summer and the Christmas holiday. (R. p.196, ¶¶ 47, 48; R. p.205, ¶¶ 21, 22). Custom Industrial and Custom Mechanical withheld these wages and never paid them to the union.

Because the union never received the funds from Custom, the union could not pay them to the Custom Employees. As employees whose wages were wrongfully withheld, each Custom Employee had a claim under the South Carolina Payment of Wages Act for wages owed, treble damages, and attorney's fees. *See* S.C. Code Ann. § 41-10-10, *et seq.*

In pertinent part, section 41-10-80 provides:

> In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 *the employee* may recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow. Any civil action for the recovery of wages must be commenced within three years after the wages become due.

S.C. Code Ann. § 41-10-80(C) (Supp. 2012) (emphasis added). Thus, the statute provides standing to the employee to pursue an action; the union could not, and did not, sue under the Act. *Cf. Carolina Alliance for Fair Employment v. South Carolina Dept. of Labor, Licensing and Regulation*, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999) (an organization has standing only if it alleges that it or its members will suffer an individualized injury; a mere interest in a problem is not enough).

In the action that the Custom Employees brought against Custom Industrial and Custom Mechanical under the Act, Custom Industrial and Custom Mechanical admitted that they had wrongfully withheld wages from the Custom Employees. (R. p.196, ¶¶ 51, 52; R. p. 206, ¶¶ 25, 29). By Confession of Judgment entered on February 14, 2011, Custom Industrial, Custom Mechanical and their sister company confessed judgment to the Custom Employees for $275,000.00 for the wrongfully withheld vacation pay. This judgment is valid and undergirds the lien that the Custom Employees have under Section 29-7-10 in the funds Custom's lawyers received on Custom's behalf.

Accordingly, this Court should reverse the circuit court's order insofar as it holds that the withheld funds were owed to the unions instead of the Custom Employees and that the Custom Employees had no independent action against Custom with regard to the

unpaid wages. The Court should remand this matter to the circuit court with instructions to enter judgment finding the Custom Employees' statutory lien has priority to the funds remaining in escrow over the liens asserted by the Banks.

II.

THE CIRCUIT COURT ERRED IN APPLYING A STRICT RULE OF CONSTRUCTION TO S.C. CODE ANN. § 29-7-10 RATHER THAN A LIBERAL CONSTRUCTION REQUIRED OF REMEDIAL STATUTES

The circuit court ruled that Section 29-7-10 must be strictly construed. (R. p. 47). However, because the section is remedial in nature, the correct rule of construction requires that the statute be liberally construed to carry out its purpose. This Court should reverse the circuit court's application of a strict rule of construction and should apply the more liberal rule required of remedial legislation.

In ruling that Section 29-7-10 must be strictly construed, the circuit court ostensibly relied upon *Bellsouth Telecommunications Inc. v. Dekalb Concrete Products Inc.*, 1995 WL 578191 (D.S.C. 1995), which cited to *Morgan & Austin v. D.W. Alderman & Sons Co.*, 70 S.C. 462, 50 S.E. 26 (1905). The circuit court also purported to rely upon *Poinsett Construction Co. v. Fischer*, 301 S.C. 343, 391 S.E.2d 875 (Ct. App. 1990). However, none of these cases mandate application of a rule of strict construction, and are not controlling on this point of law.

In *Bellsouth*, the district court stated:

> Moreover, the courts of South Carolina have quite clearly stated that Section 29-7-10 'must be strictly construed.' *Morgan & Alston*, 50 S.E. 26 at 27. See also *Poinsette Constr. Co. v. Fischer*, 391 S.E.2d 875 (S.C. App.1990) (rejecting a public policy argument for loosely construing

> Section 29-7-10 and stating 'this court [does not] have the authority to construe a statute based on its own notion of whether the statutory scheme is a good idea.').

Slip at 3. Hence, the federal district court was predicting the rule of construction based upon an excerpt from *Morgan* and language it found persuasive in *Poinsette*. The *Bellsouth* case therefore adds little to this discussion.

Second, even under a liberal construction, the result in *Bellsouth* would have been the same. The funds in that case never came into the possession of the contractor, Kelly Green. Further, the work for which the third party sought a lien involved burying underground cable, not construction of a building – under any construction of the statute, burying cable would not fall within the statute's express language. Finally, the case is an unpublished order from the federal district court, and while it may be persuasive on certain points, it is not binding authority in this case.

The case upon which *Bellsouth* relied, *Morgan*, also does not mandate application of a rule of strict construction. In *Morgan*,[1] the Supreme Court stated:

> Conceding, for the purpose of this case, that the act of 1896 gives to materialmen a lien enforceable in a civil action, we do not think plaintiffs have established any lien upon the money in question. By the terms of the act, no lien can exist until the contractor has received the money. *The statute creating such lien must be strictly construed.* The lien is not given upon the money in the hands of the owner, which the contractor is entitled to receive, for the owner is expressly exempt from any responsibility whatever, but the lien is upon the money in the hands of the contractor. This condition has not arisen in this case, as the money has never been in the hands of the contractor, but was received from Revis by the sheriff by virtue of the attachment. Having no lien upon the money in the hands of the sheriff, plaintiffs have no status with respect to the money realized by the attachment, and now applicable to defendant's judgment.

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[1] Morgan is discussed in Part I (B) of this brief on pages 18-19.

70 S.C. at 465, 50 S.E. at 27 (emphasis added). Thus, the Supreme Court made this statement without citation to authority. Furthermore, even under a liberal construction of the statute, the result in *Morgan* would be the same. No lien could have attached because the funds were paid to the sheriff, not to the contractor or its agent.

The other case the district court relied upon, *Poinsett*, does not hold strict construction is required.[2] The district court stated the Court of Appeals in *Poinsett* "reject[ed] a public policy argument for loosely construing Section 29-7-10 and stat[ed] 'this court [does not] have the authority to construe a statute based on its own notion of whether the statutory scheme is a good idea.'" *Bellsouth*, slip op. at 3. This was, however, an overreading of the language from *Poinsett*. In *Poinsett*, the Court of Appeals stated:

> The Circuit Court further reasoned that: "To give a subcontractor a priority, without recording anything after another loan was previously made, would not be fair to lenders, and would not be economically viable and contrary to the public interest and the public good." In our opinion, an equally sound argument can be made that it would be just as commercially troublesome and every bit as unfair to allow a general contractor to collect money for work performed by a subcontractor and then, instead of paying the subcontractor for its work, use the money to pay a previous loan. In any event, neither the Circuit Court, *this Court, nor, for that matter, any court has the authority to construe a statute based on its own notion of whether the statutory scheme is a good idea.* To do so would contravene a fundamental principle of statutory construction:
>
> > In the interpretation of statutes our sole function is to determine and, within constitutional limits, give effect to the intention of the legislature. We must do this based upon the words of the statutes themselves. To do otherwise is to legislate, not interpret. The responsibility for the justice or wisdom of legislation rests exclusively with the legislature, whether or not we agree with the laws it enacts.

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[2] Poinsett is discussed in Part I (B) of this brief on pages 15-16.

Smith v. Wallace, 295 S.C. 448, 452, 369 S.E.2d 657, 659 (Ct. App.1988). 301 S.C. at 345-346, 391 S.E.2d at 877 (emphasis added). The district court plucked the italicized language from the opinion and described that language as rejecting a liberal construction of the statute. However, as can be seen, the *Poinsett* court was applying the fundamental rule that the language of the statute itself should control, and a court should not ignore the plain language just because the court does not agree that the scheme adopted by the legislature was a good idea. There is nothing in the language in *Poinsett* that requires a strict construction rather than a liberal construction that adheres to remedial legislation. *E.g.*, *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 663 S.E.2d 484 (2008) (a statute remedial in nature should be liberally construed in order to accomplish the object sought).

Other states with similar legislation have determined this sort of statute is remedial. For example, in discussing Alaska's "Little Miller" Act, the Supreme Court of Alaska stated "the Alaska statute, like the federal Miller Act, is remedial in nature and is to be liberally construed to effectuate its purpose." *Imperial Mfg. Ice Cold Coolers, Inc. v. Shannon*, 101 P.3d 627, 630 (Alaska 2004). The Court added that the statute's purpose is "to protect persons who furnish labor or material for a state public works project from the risks of nonpayment." *Id.* at 629. Citing a Colorado case, Alaska's Court stated further that "[t]he purpose of the Miller Act is to ensure that subcontractors have some remedy if they are not paid, since on public projects they cannot protect themselves by filing a lien." *Id.* at 630.

The Miller Acts provide extra protection for laborers "since on public projects

they cannot protect themselves by filing a lien." *Id.* Section 29-7-10 has a similar purpose to the Miller Acts, both "big" and "little." The Code allows laborers to recover for work that they perform but gives no mechanism for filing a lien. Instead, the laborers' lien statute is the tool that protects workers from the risk of nonpayment. Here, the Custom Employees are at risk of nonpayment, and this risk is similar to the risk born by someone who provides labor or material under the Miller Acts.

Also instructive on this point is South Carolina's Mechanics Lien statute, Section 29-5-10(a) of the South Carolina Code. Section 29-7-10 contains similar terms and phrases as the Mechanic's Lien statute, which our Courts have found to be remedial legislation requiring liberal construction. *Clo-Car Trucking Co., Inc. v. Clifflure Estates of S.C., Inc.*, 282 S.C. 573, 320 S.E.2d 51 (Ct. App. 1984) (mechanic's lien statutes, being remedial, are to be given a liberal construction). *Clo-Car* is persuasive on this point and supports the argument by the Custom Employees that the circuit court erred in strictly construing Section 29-7-10.

Accordingly, this Court should reverse the circuit court's ruling that Section 29-7-10 should be strictly construed. This Court should instead apply the liberal rule of construction that is required of remedial legislation.

III.
THE CIRCUIT COURT ERRED IN FAILING TO CONSIDER THE CUSTOM EMPLOYEES' RIGHTS UNDER THE PAYMENT OF WAGES ACT

The circuit court stated in a footnote, "Even if a lien under S.C. Code Ann. § 29-7-10 had attached in this case, the Court would only award such actual damages as could be proven." (R. p.47, n. 1). Inasmuch as this dictum may be seen as a holding in the matter, the Court should reverse the ruling as contrary to law.

As noted, the Custom Employees asserted rights under the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10, *et. seq.*, through which the Custom Employees sued Custom Industrial and Custom Mechanical, obtained the confession of judgment for $275,000.00, and obtained the Warrant of Attachment.

The Act sets forth the remedies available to the Custom Employees in this matter. Under the Act, if an employer fails to pay an employee, "the employee may recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow." S.C. Code Ann. § 41-10-80(C) (Supp. 2012). The Act defines "wages" as follows:

> "Wages" means all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount *and includes vacation, holiday, and sick leave payments which are due to an employee under any employer policy or employment contract.* Funds placed in pension plans or profit sharing plans are not wages subject to this chapter.

S.C. Code Ann. § 41-10-10(2) (Supp. 2012) (emphasis added).

The Custom Employees are claiming wages due to them under a contract of employment that set up the vacation/holiday savings fund which consisted entirely of

employee earnings. These payments therefore fall within those covered by the Act. Contrary to the circuit court's notation, treble damages are appropriate when the withholding was unreasonable and there was no good faith wage dispute. *See Rice v. Multimedia, Inc.*, 318 S.C. 95, 98, 456 S.E.2d 381, 383 (1995) (the decision to award treble damages is discretionary, and the penalty should not be imposed "if there is a good faith dispute over wages allegedly due"). *Compare Wall v. Fruehauf Trailer Services, Inc.*, 123 Fed. Appx. 572 (4th Cir. 2005) (no specific finding of bad faith is required for treble damages under the Act). Under the Act, the Custom Employees were awarded $275,000.00, which is the amount of their statutory lien.

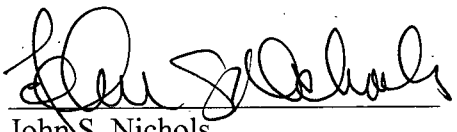
Furthermore, the Custom Employees are entitled to post-judgment interest which accrues daily. S.C. Code Ann. § 34-31-20 (B) (Supp. 2013). They are also pursuing costs and attorney's fees under the Uniform Declaratory Judgment Act, S.C. Code Ann. § 15-53-100 (2005). (R. pp.288-289).

Accordingly, inasmuch as the circuit court's statement in a footnote in the order is a holding of the case, this Court should reverse that holding as contrary to the law of South Carolina. The Court should remand the matter with instructions for the circuit court to calculate the extent of the lien held by the Custom Employees, taking into account all elements of recovery permitted by the Payment of Wages Act, the Declaratory Judgment Act, the post-judgment interest statute, and other provisions of law.

CONCLUSION

For the reasons stated the Court should reverse the special referee's judgment and should remand this matter for further proceedings consistent with this Court's opinion.

Respectfully submitted,



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