THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

James C. Williams, Jr., Special Referee

Case No. 2010-CP-40-8621

Appellate Case No. 2013-001839

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

v.

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

And

Custom Mechanical CSRA, LLC is . . . . . Third-Party Plaintiff /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. Griffin, 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. Griffin, 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. are . . . . . Appellants

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

FINAL BRIEF OF RESPONDENTS PRESIDENTIAL FINANCIAL CORPORATION AND SECURITY FEDERAL BANK

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INTRODUCTION

In 2006, the Kimberly-Clark Corporation hired C.R. Meyer & Sons Company ("C.R. Meyer") as the general contractor for a project at a plant in Beech Island, South Carolina. Custom Mechanical CSRA, LLC ("Custom Mechanical") was a subcontractor and provided union-labor services for the project through its wholly-owned subsidiary, Custom Industrial Services, LLC ("Custom Industrial").[1] Appellants[2] were employees of Custom Industrial, who through contracts with their union, elected to have varying percentages withheld from their wages and paid into a "vacation fund."

Presidential Financial Corporation ("Presidential") and Security Federal Bank ("Security Federal")[3] each loaned money to Custom Mechanical to fund its work on the project. Presidential and Security Federal obtained perfected security interests in the

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[1] Appellants collectively refer to Custom Industrial and Custom Mechanical as the "Custom entities"; however, an important fact in this litigation is that they are separate entities. Furthermore, Appellants' pleading for the issues on appeal does not allege piercing of the corporate veil or other alter ego theory.

[2] Appellants are 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. Griffin, 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.

[3] Appellants collectively refer to Presidential and Security Federal as "the Banks." While both entities made loans which led them to be creditors of Custom Mechanical, Presidential is not a bank. To be a bank, an entity must abide by certain statutes and regulations that do not apply to Presidential; therefore, Presidential does not want to give the Court the impression that it is something it is not. Presidential is an asset-based lender that focuses on growing businesses; however, recently in 2013, it was acquired as a subsidiary of MidFirst Bank, located in Oklahoma.

accounts receivable owed by C.R. Meyer to Custom Mechanical. C.R. Meyer stopped payment to Custom Mechanical, and Custom Mechanical defaulted on the loans and other debts. Appellants sued Custom Mechanical and Custom Industrial in the Court of Common Pleas of Aiken County under the South Carolina Payment of Wages Act to recover their vacation pay funds that Custom Industrial allegedly failed to remit to the union. Appellants obtained a confession of judgment against Custom Mechanical and Custom Industrial.

C.R. Meyer and Custom Mechanical arbitrated claims that C.R. Meyer owed Custom Mechanical money based on the contracts between the parties, and the resulting arbitration award ("Arbitration Award") was confirmed by the circuit court. C.R. Meyer filed this lawsuit to contest the Arbitration Award but then settled by paying One Million Eight Hundred Thousand AND NO/100 Dollars ($1,800,000) into Custom Mechanical's attorney's escrow account for the benefit of Custom Mechanical's numerous creditors. Because the amount of the outstanding claims against Custom Mechanical exceeds the amount of the Arbitration Award, the issues before this Court concern claims for priority of the funds in the escrow account. Presidential and Security Federal's perfected security interests take priority over all other creditors except those entitled to a first lien under S.C. Code Ann. Section 29-7-10. Accordingly, it is undisputed that if a lien does not attach under Section 29-7-10, Presidential and Security Federal have priority over Appellants to the remaining proceeds of the Arbitration Award.

The Special Referee properly granted summary judgment to Presidential and Security Federal because their perfected security interests take priority over Appellants'

judgment claim. The Special Referee held Appellants cannot establish a statutory first lien under Section 29-7-10 because (1) they were employed by Custom Industrial, not Custom Mechanical, and Custom Mechanical is the only party to this litigation; (2) Custom Mechanical never received the escrow funds for a lien to attach; and (3) the vacation funds were to be paid to and held by the union, and that claim has been litigated and resolved. Finally, the Special Referee properly held that even if a first lien attached, the lien only prioritizes amounts covered by the statute.

STATEMENT OF THE CASE

On December 9, 2010, C.R. Meyer initiated this lawsuit to modify and/or vacate an arbitration award to Custom Mechanical following disputes that arose under the subcontract agreement between them. In addition to its Answer, Custom Mechanical filed a Third-Party Complaint on February 2, 2011, alleging that the Third-Party Defendants "may have an interest in the proceeds of the One Million, Seven Hundred Seventy-Six Thousand, Five Hundred Forty-eight and No/100 ($1,776,548.00) Dollars [sic] arbitration award," because the total of all known claims exceeds the net proceeds of the arbitration award. Custom Mechanical asked the court to require C.R. Meyer to pay the arbitration proceeds into the registry of the court for distribution to the Third-Party Defendants.

The Third-Party Defendants each answered the Third-Party Complaint acknowledging they were all creditors of Custom Mechanical. Appellants filed their answer to the Third-Party Complaint on March 9, 2011. Presidential answered the Third-Party Complaint on June 6, 2011, and Security Federal answered the Third-Party Complaint on October 20, 2011.

The award from the arbitration matter between C.R. Meyer and Custom Mechanical was confirmed by the trial court on November 1, 2011. Rather than appeal, C.R. Meyer agreed to pay Custom Mechanical Two Million Dollars ($2,000,000). Two Hundred Thousand Dollars ($200,000) was segregated for Custom Mechanical's attorneys' fees and expenses. The remaining funds were placed in escrow at Richardson Plowden & Robinson, P.A., Custom Mechanical's attorneys, for the benefit of the

creditors until their priority was determined by the Court.

On June 22, 2012, Presidential and Security Federal jointly moved to amend their answers. Their motion was granted on July 19, 2012. Following the court's order and on the same day, Presidential and Security Federal filed a joint amended answer and counterclaim and cross-claim. Presidential and Security Federal asserted a claim for Declaratory Judgment pursuant to S.C. Code Ann. § 15-53-10 *et seq.*, because they have priority over all other alleged liens, and their secured claims exceed the settlement award, encumbering the entire balance.

Appellants answered Presidential and Security Federal's cross-claim on August 1, 2012, and asserted a cross-claim of their own for a first lien over the arbitration award under S.C. Code Ann. § 29-7-10. They claim they are entitled to the amount of their outstanding judgment against Custom Mechanical and Custom Industrial, Two Hundred and Seventy-Five Thousand ($275,000), as well as pre-judgment interest. Custom Mechanical answered Appellants' counterclaim on August 9, 2012. Presidential and Security Federal filed a reply and answer to Appellants' cross-claim on August 17, 2012. By January 24, 2013, all other Third-Party Defendant creditors had voluntarily dismissed their claims relating to this matter.

On October 19, 2012, Presidential and Security Federal filed a Motion For Disbursement of Remaining Funds. The Special Referee agreed and ordered One Million Four Hundred Seventy-Five Thousand and NO/100 Dollars ($1,475,000) of the arbitration settlement funds to be disbursed to Presidential and Security Federal on November 7, 2012, leaving Three Hundred Twenty-Five Thousand ($325,000) in escrow

pending the outcome of this litigation.

On October 12, 2012, Presidential and Security Federal filed a Motion for Summary Judgment, which they amended and re-filed on November 15, 2012, and again on December 7, 2012. Appellants filed a Motion for Summary Judgment on October 19, 2012, and later amended on December 3, 2012. Additionally, before the summary judgment hearing, the Court signed consent orders joining Appellants Leonard Wade Cliett, Joseph A. Doyle, and Brian Fields on November 27, 2012, and joining the Estate of William R. McFerrin by and through its Duly-Appointed Executrix, Nancy McFerrin on January 15, 2013.

After hearing oral arguments on March 19, 2013, the Special Referee granted Presidential and Security Federal's Motion for Summary Judgment in an Order filed May 28, 2013. Appellants filed a Motion to Alter or Amend Judgment on June 7, 2013, which the Special Referee denied by Order filed July 16, 2013. Appellants filed their Notice of Appeal with this Court on August 15, 2013.

STATEMENT OF FACTS

This case concerns Appellants' alleged priority under S.C. Code Ann. Section 29-7-10 to a first lien on approximately Fifty Thousand Dollars ($50,000) if successful. The sole purpose of the current litigation is to determine who has priority to the remaining amounts deposited into escrow for Custom Mechanical's, not Custom Industrial's, creditors.

A. Background Facts

1. The Project and the Entities

In 2006, the Kimberly-Clark Corporation ("Kimberly-Clark") hired C.R. Meyer as the general contractor to add a fourth tissue-paper line, known as the B-14 Expansion Project/Tissue Machine Project, to a plant in Beech Island, South Carolina. C.R. Meyer entered into seven subcontracts with Custom Mechanical to, among other things, construct portions of the piping and plumbing work for the B-14 Expansion Project. Custom Mechanical was also to work on an existing diaper line at another part of the facility, known as the Hulk Project (the B-14 Expansion Project and the Hulk Project are collectively referred to as the "Project"). (R. pp. 238-240; pp. 474-475). Custom Mechanical provided union-labor services for the Project through its wholly-owned subsidiary, Custom Industrial Services, LLC ("Custom Industrial"). (R. p.474, n.1; p.493). Appellants performed work which included pipefitting, plumbing, and welding, on the Project.

2. The Loans and Secured Interests

Custom Mechanical borrowed money from Security Federal and Presidential to fund work on the Project. Security Federal loaned Custom Mechanical Two Million One Hundred Fifty-One Thousand, Five Hundred Ninety-Four and NO/100 Dollars ($2,151,594). (R. pp. 528-579). Security Federal perfected a security interest in inventory, furniture, fixtures, equipment, accounts receivable, instruments, documents, chattel paper, and general intangibles that were existing then or to be thereafter acquired on August 1, 2006. (R. pp. 581-585).

Presidential provided One Million Two Hundred and Fifty Thousand Dollars ($1,250,000) as a working capital line of credit to Custom Mechanical. (R. pp. 587-595). Presidential filed a UCC-1 financing statement perfecting its security interest in the accounts receivable paid by C.R. Meyer to Custom Mechanical on May 4, 2007. (R. pp. 597-598). Presidential also took a secured interest in

> (1) all accounts, . . ., notes receivable, contact rights, money, deposit accounts, general intangibles (including but not limited to payment intangibles), documents, instruments, chattel paper (whether tangible or electronic), letters of credit, letter of credit rights and investment property; (2) all supporting obligations relating to any of the foregoing; (3) all inventory, equipment, fixtures and other goods of any nature whatsoever; (4) all substitutions, accessions, additions and replacement of or to any of the foregoing; and (5) all proceeds of any of the foregoing.

Id. Custom Mechanical defaulted on both of these loans. (R. pp. 600-613).

3. The Vacation Fund

Appellants were all members of the Plumbers & Steamfitters Local #150 (the "union"), and the union gave them the opportunity to participate in a voluntary payroll deduction plan. Appellants elected to have five, ten, or fifteen percent of their weekly wages deducted, and the amounts deducted would be set aside into a vacation/holiday savings fund. (*See e.g.,* R. pp. 615-625). These vacation funds were withheld pursuant to a collective bargaining agreement ("CBA") between Custom Industrial and the union. (R. pp. 634-643; p.647, para. 8-p.648, para.12). Custom Industrial would remit the withheld amounts to the union. The wages for employees on the Project were paid by Custom Industrial, so the vacation fund money would also have been funded by Custom Industrial. (R. p. 494, para. 3; pp. 497-526; pp. 657-679). The money withheld from each individual's wages was then held by the union Vacation Fund until the union drafted checks to Appellants during the summer and before the Christmas holiday. (R. p.629, lines 6-19). At some point, Custom Industrial stopped remitting payments to the union fund.

B. Prior Litigation

1. Appellants' Wage Payment Act Suit Against Their Employer and Others.

Prior to this lawsuit, on July 25, 2008, in the court of common pleas of Aiken County, South Carolina, twenty-six of the current twenty-nine Appellants brought a lawsuit styled *Daniel R. Friedmann; Tony Hall; Timothy R. Hall, Jr.; Ralph D. Black; Thomas Brittingham; Arthur C. Carlson; Christopher Cullipher; David W. Cullipher;*

Charles R. Ellzey; Clayton W. Google, Jr.; Martin Granger; William R. Griffin, Jr.; Jack E. Hegler; George G. Lever; Matt Lever; Ernest H. Lewis, III; William R. McFerrin; Daniel Nichols; Kinda Phommachanh; Raleigh B. Roye; Nicholas Stewart; Timothy P. Stock; James Waltemath; Al Tiska; Al Carpenter; Bruce Pollock, Jr. v. Custom Industrial Services, LLC; Custom Mechanical CSRA, LLC; Custom Mechanical CSRA, Inc.; Custom Machine and Welding, Inc.; Danny Key; George Bryon "Bo" Herrington; David Herrington; Dean Durand; and Geneva Wright, Civil Action No. 2008-CP-020413. That complaint alleged that Custom Mechanical and Custom Industrial were interrelated companies such that the plaintiffs were employees of both Custom Mechanical and Custom Industrial, and they failed to disburse the employees' vacation funds due in summer 2007. The employees brought causes of action for violation of the South Carolina Payment of Wages Act ("Wage Payment Act"), S.C. Code Ann. Section 41-10-10, *et seq.*, breach of fiduciary duty, conversion, declaratory judgment, and breach of trust to recover the vacation funds allegedly owed. (R. p.170, para. 54-p.173, para. 81; p.186, para. 57-p.189, para. 84; p.197, para. 59-p.200, para. 86; p.217, para. 60-p.220, para. 87). Appellants sought treble damages, costs, and attorney's fees as provided under the Wage Payment Act, S.C. Code Ann. § 41-10-80 (c). (R. p.170, para. 54-p.171, para. 64; p.186, para. 57-p.187, para. 67; p.197, para. 59-p.198, para. 69; p.217, para. 60-p.218, para. 70). That litigation concluded with a confession of judgment by Custom Industrial, Custom Mechanical, and Custom Mechanical CSRA, Inc. filed on February 14, 2011 in the amount of Two Hundred Seventy-Five Thousand AND NO/100 Dollars ($275,000). (R. pp. 484-488). The confession of judgment allowed Appellants to pursue enforcement

of the judgment. *Id.* Neither Presidential nor Security Federal were parties to this Aiken lawsuit or the confession of judgment.

2. Presidential and Security Federal's lawsuits against Custom Mechanical and each other.

Prior to the current litigation, Presidential obtained a consent judgment against Custom Mechanical for One Million Two Hundred Twenty Thousand Five Hundred Ninety-Seven AND 86/100 Dollars ($1,220,597.86) plus post-judgment interest in the State of Georgia, which was later domesticated in South Carolina and returned *nulla bona*. (R. pp. 600-613).

Presidential and Security Federal were involved in separate litigation in the court of common pleas of Aiken County, South Carolina over their respective priority to monies owed by C.R. Meyer to Custom Mechanical for the Project. Security Federal sued other entities as well, including Custom Industrial and Custom Mechanical.[4] Security Federal and Presidential reached a settlement whereby they agreed to share equally in the proceeds of the Arbitration Award. Accordingly, their interests in the Arbitration Award at issue in this case are mutual.

3. Arbitration between C.R. Meyer and Custom Mechanical.

Also, before the present lawsuit, C.R. Meyer and Custom Mechanical disputed amounts owed by C.R. Meyer to Custom Mechanical under their subcontracts. Custom

[4] *Security Federal Bank v. Custom Industrial Services, LLC; Custom Mechanical CSRA, LLC; Custom Mechanical CSRA, Inc.; Custom Machine and Welding, Inc.; Danny L. Key; Dean H. Durand; Joy B. Durand; Janice W. Herrington; Presidential Financial Corporation; The South Carolina Department of Revenue, An Agency of the State of South Carolina; Charleston Rigging & Marine; and Ferguson Enterprises, Inc.*, Civil Action No. 2009-CP-02-02812

Industrial was not a party to this dispute. The subcontracts contained an arbitration clause; therefore, C.R. Meyer and Custom Mechanical arbitrated under the auspices of the American Arbitration Association in Richland County, South Carolina, the Rules of the Association, the Uniform Arbitration Act and the Federal Arbitration Act. (R. p.239, paras. 5-6). The arbitration took place from September 27, 2010 through September 30, 2010. On November 11, 2010, the arbitrators issued the written Arbitration Award, finding that C.R. Meyer materially breached the seven subcontracts with Custom Mechanical and granting Custom Mechanical One Million Seven Hundred Seventy-Six Thousand Six Hundred Forty-Eight AND NO/100 Dollars ($1,776,648) exclusive of attorneys' fees and legal expenses. (R. pp. 479-480). Additionally, the arbitrators found that Custom Mechanical was entitled to Two Hundred Thousand AND NO/100 Dollars ($200,000) as a reasonable attorneys' fee, making the total recovery One Million Nine Hundred Seventy-Six Thousand Six Hundred Forty-Eight AND NO/100 Dollars ($1,976,648). (R. p.481).

4. The Present Lawsuit.

Filing a complaint in the court of common pleas of Richland County, South Carolina on December 9, 2010, styled *C.R. Meyer and Sons Company v. Custom Mechanical CSRA, LLC*, Civil Action No. 2010-CP-40-8621, C.R. Meyer sought modification, correction, and/or vacation of the Arbitration Award. Meanwhile, Appellants sought a warrant of attachment on the Arbitration Award, and that warrant of attachment was ordered and signed on February 2, 2011. (R. p.489).

Custom Mechanical denied that any modification, correction, and/or vacation of

the award would be proper and filed a Third-Party Complaint, naming its known creditors as Third-Party Defendants (R. p.249, para. 1-p.251, para. 13). Custom Mechanical requested the Arbitration Award be paid into the registry of the court since the total amount of the Third-Party Defendants' claims exceeds the net proceeds of the Arbitration Award. (R. p.250, para. 12-p.251, para. 14).

The Third-Party Defendants answered the Third-Party Complaint acknowledging that they were creditors of Custom Mechanical. Security Federal intervened in the action and filed its answer. By Order filed November 1, 2011, the court found that Custom Mechanical presented sufficient evidence to support confirmation of the Arbitration Award. (R. pp. 22-23). On November 28, 2011, C.R. Meyer timely filed a Notice of Appeal of the Confirmation Order. However, rather than pursing the appeal, C.R. Meyer and Custom Mechanical reached a settlement memorialized by Order filed on March 5, 2012 ("Settlement Order"), that directed C.R. Meyer to pay the sum of Two Million AND NO/100 Dollars ($2,000,000) into the escrow account of Richardson Plowden & Robinson, P.A.,[5] segregating Two Hundred Thousand AND NO/100 Dollars ($200,000) for Custom Mechanical's attorneys' fees. (R. pp. 24-25). The Order further provided that the Third-Party Defendants could assert priority and claims to the funds being held and that Custom Mechanical would also be entitled to assert "any priority" it had to the funds. (R. p.25, para. 3). Finally, the Settlement Order provided that future disbursements only would be made by order of the court. (R. p.25, para. 3).

[5] Richardson Plowden & Robinson, P.A. represented Custom Mechanical in the arbitration and resulting litigation, including the filing of the Third-Party Complaint in the present litigation.

C. Claims Of Appellants And Respondents

Following settlement of the Arbitration Award, Presidential and Security Federal moved to amend their answers to assert a counterclaim and cross-claim pursuant to the Uniform Declaratory Judgment Act. S.C. Code Ann.§ 15-53-10 *et seq.* The unopposed motion was granted on July 13, 2012 and a preliminary scheduling order was entered. Presidential and Security Federal filed their Amended Answer To Third-Party Complaint And Counterclaim And Crossclaim on July 19, 2012, seeking the court declare they had priority over the other Third-Party Defendants by virtue of their perfected security interests in Custom Mechanical's "accounts, accounts receivable, proceeds, and all Supporting Obligations related thereto." (R. p. 278, paras. 23-34). Appellants on August 1, 2012, filed a Joint Reply, Counterclaim, and Crossclaim ("Joint Reply") denying Presidential and Security Federal's assertion of priority and filing their own declaratory judgment action. They asserted a priority lien pursuant to Section 29-7-10 and alleged that they had obtained a judgment for $275,000 in prior litigation. Notably, Appellants' Joint Reply contains no allegation or claim relating to the Wage Payment Act or any theory of piercing the corporate veil, alter ego, or an amalgamation of interests.

The union was also a Third-Party Defendant in the present lawsuit. The union answered Presidential and Security Federal's cross-claim on August 3, 2012. Specifically, the union claimed it had outstanding judgments against Custom Industrial and Custom Mechanical such that it claimed an interest in the Arbitration Award, and the union denied Presidential and Security Federal had priority to the Arbitration Award. The union was therefore pursuing the same monies as Appellants, the payments allegedly

not made to the union's Vacation Fund. The union also answered Appellants' cross-claim, stating that Appellants were not entitled to priority since, *inter alia*, the union already had obtained judgments on behalf of the beneficiaries of the Vacation Fund, so to the extent Appellants were seeking the same monies, their claims were barred. The union later settled with Respondents Presidential and Security Federal and dismissed their claims with prejudice. (R. pp. 373-374).

In their answer to Appellants' cross-claim, Presidential and Security Federal denied Appellants' right to priority and stated that Appellants lacked standing and have waived their claims for priority. (R. pp. 303-312).

On October 19, 2012, Presidential and Security Federal filed a Motion For Disbursement of Remaining Funds. Finding it was not disputed that Presidential and Security Federal had a combined secured interest in the Arbitration Award that exceeded the amount of the award and that Appellants assert priority to only $275,000 of the $1,800,000, the court ordered One Million Four Hundred Seventy-Five Thousand and NO/100 Dollars ($1,475,000) of the arbitration settlement funds to be disbursed. (R. pp. 38-41). Thus, Three Hundred Twenty-Five Thousand ($325,000) remains in escrow pending the outcome of this litigation. Although the parties agreed to raise the amount remaining in escrow from $275,000 to $325,000, Respondents dispute that Appellants are in any way entitled to the remaining amount even if they were to prevail. All of the money in the Arbitration Award would have been delivered to Respondents Presidential and Security Federal but for the present dispute on appeal. Because $1,475,000 has already been received by Presidential and Security Federal, this matter is limited to the

remaining funds in the Arbitration Award.

D. Current Appeal

The current appeal stems from Appellants' and Presidential and Security Federal's cross-motions for summary judgment. The Special Referee granted Presidential Financial and Security Federal's motion and denied Appellants' motion by order dated May 28, 2013.

Presidential and Security Federal argued that Presidential and Security Federal's perfected security interests take priority over all other creditors except those entitled to a first lien under S.C. Code Ann. § 29-7-10. Additionally, Presidential and Security Federal argued the statute does not operate to establish a lien for Appellants because they were employed by Custom Industrial, a different corporate entity which is not a creditor of Custom Mechanical; the unpaid vacation funds were to be paid to and held by the union, and any claim for default of that agreement belonged to the union and has been litigated; and even if they were entitled to a judgment against Custom Mechanical for their unpaid vacation funds, which they are not, Appellants are not entitled to a Section 29-7-10 first lien and are behind the secured parties. (R. pp. 344-357).

Appellants' motion argued that they were entitled to priority, based upon the Wage Payment Act, for the vacation funds due to them under their employment contracts and asserting treble damages are also appropriate. Additionally, Appellants argued that Section 29-7-10 gave them a first lien because they did "underground and above-ground plumbing work, laid utility line and pipes on the roof and through the building, installed a large, complex, tissue machine." (R. p.369). Further, Appellants asserted that the

language in Section 29-7-10 is not defined; therefore, it is necessary to look to the federal Miller Act and accompanying Little Miller Acts as well as the South Carolina Mechanic's Lien to provide guidance on the definitions of terms such as "buildings" and "erection, alteration and repair." (R. pp. 365-371). At the hearing, Appellants admitted that, by their calculation, the amount of vacation funds withheld was approximately Eighty Thousand AND NO/100 Dollars ($80,000) but that the treble damages, attorney's fees, and costs made up the rest of the $275,000 to which they claimed they were entitled. (R. p.445, line 16-p.446, line 6; p.468, lines 3-6).

The Special Referee granted summary judgment to Presidential and Security Federal because their perfected security interests[6] take priority over Appellants' claims if a first lien does not attach pursuant to Section 29-7-10. While the Special Referee found Appellants were laborers who participated in erection, alteration or repair for purposes of the statute, he found a first lien does not attach for Appellants because (1) they were employed by Custom Industrial, not Custom Mechanical, and Custom Mechanical is the only party to this litigation; (2) Custom Mechanical never received the escrow funds for a lien to attach; and (3) the vacation funds were to be paid to and held by the union, and that claim has been litigated and resolved. Finally, the Special Referee held that even if a lien attached, the only damages that could be awarded would be those that could be proven. (R. p.47, n.1).

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[6] Appellants did not appeal the Special Referee's finding that Presidential and Security Federal had perfected security interests. Thus, Presidential and Security Federal have priority unless Section 29-7-10 provides a first lien to Appellants. S.C. Code Ann. §§ 36-9-322(a), 36-9-317(a).

Therefore, since it is not contested that Presidential and Security Federal have perfected security interests which take priority unless Section 29-7-10 operates to establish a statutory lien, this appeal concerns the narrow issue of whether Appellants are entitled to a lien under Section 29-7-10 for a portion of the remaining $325,000 in Arbitration Award funds currently being held in escrow pending a court order on the determination of priority and distribution of funds.

ARGUMENT

I. The Special Referee Properly Granted Summary Judgment Because Appellants Cannot Prove Statutory Priority Under S. Code § 29-7-10.

The Special Referee appropriately found Appellants cannot prove statutory priority pursuant to Section 29-7-10. The courts of South Carolina have held that the statute is to be strictly construed, and under that construction, the money must come into the hands of the subcontractor, in this case Custom Mechanical, in order for a lien to attach. Therefore, whether Appellants are laborers who participated in the erection, alteration, or repair of buildings does not matter because under the strict construction of the statute, the money was never received by Custom Mechanical. As outlined below, Appellants do not have a lien under Section 29-7-10 against Custom Mechanical; therefore, Respondents Presidential and Security Federal met their burden, and the Order of the Special Referee should be affirmed.

A. Standard of Review

On appeal, the Court applies the same standard as the trial court pursuant to Rule 56(c), SCRCP *Turner v. Millman*, 392 S.C. 116, 121-122, 708 S.E.2d 766, 769 (2011);

Fleming v. Rose, 350 S.C. 488, 493-494, 567 S.E.2d 857, 860 (2002) (citing *Peterson v. West Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999)). Summary judgment is appropriate where, as here, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(e), SCRCP; *Baughman v. American Telephone & Telegraph Co.*, 306 S.C. 101, 111, 410 S.E.2d 537, 545 (1991). Moreover, "[a] party opposing summary judgment must do more than rely on mere allegations." *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008) (citing *Dyer v. Moss*, 208 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985)).

B. Any Argument About Amalgamation Of Interests Is Not Preserved For Review.

In their initial brief, Appellants argue "there is an amalgamation of interests between the Custom entities." (App. Br., pp. 13-14). To support that argument, Appellants point to indicia of "an amalgamation of interests," including having the same managing member and an accountant that did work for both Custom Mechanical and Custom Industrial. *Id.* However, the theory of amalgamation of interests between Custom Mechanical and Custom Industrial, as well as the theories for piercing the corporate veil or treating Custom Mechanical and Custom Industrial as alter egos, has been neither alleged nor proved. *See Mid-S. Mgt. Co. Inc. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597, 649 S.E.2d 135, 140-141 (Ct. App. 2007) (finding the burden of proof rests with the party seeking to disregard the corporate form). Therefore, since the matter

was neither pled nor raised to the Special Referee, it is not preserved for review by this Court. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review).

Furthermore, even if Appellants had raised this issue to the Special Referee, it was not ruled upon, and Appellants failed to assert it in their Rule 59(e), SCRCP, motion to alter or amend. Therefore, this issue is still not preserved even if it was raised. *See Shealy v. Doe*, 370 S.C. 194, 205, 634 S.E.2d 45, 51 (Ct. App. 2006), *Noisette v. Ismail,* 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding where "the circuit court did not explicitly rule" on an argument, and no Rule 59(e) motion was made, "the issue was thus not properly before the Court of Appeals and should not have been addressed"); *Jones v. State Farm Mut. Auto. Ins. Co.,* 364 S.C. 222, 235, 612 S.E.2d 719, 726 (Ct. App. 2005) ("An issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment."); *McCall v. State Farm Mut. Auto. Ins. Co.,* 359 S.C. 372, 381, 597 S.E.2d 181, 186 (Ct. App. 2004) (holding an issue must be raised to and ruled upon by the trial court to be preserved for appellate review). Accordingly, this Court should disregard Appellants' arguments concerning an amalgamation of interests.

C. A Lien Does Not Attach For Appellants Under Section 29-7-10.

1. Section 29-7-10 Requires Strict Application Under Existing Case Law.

The Special Referee properly held Section 29-7-10 is to be construed strictly. Although "[q]uestions of statutory interpretation are questions of law, which [an appellate court] is free to decide without any deference to the court below," the purpose of statutory interpretation is to "ascertain and effectuate the intention of the legislature." *Centex Intern., Inc. v. S.C. Dep't of Rev.*, 406 S.C. 132. 138-39, 750 S.E.2d 65, 68 (2013) (finding in an appeal from a motion for summary judgment that the plain language of the statute required strict construction of the statute). "Where a statute is clear and unambiguous, there is no room for construction, and, the terms of the statute must be given their literal meaning." *Poinsett Constr. Co., Inc. v. Fischer*, 301 S.C. 343, 344, 391 S.E.2d 875, 876 (Ct. App. 1990) (citing *Spires v. Spires*, 296 S.C. 422, 423, 373 S.E.2d 698, 699 (Ct. App. 1988)).

Section 29-7-10 is plain and unambiguous in its provision of the following:

> 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***.

(Emphasis added). Therefore, its words should be given their literal meaning. Moreover, "[t]he courts of South Carolina have quite clearly stated that Section 29-7-10 must be strictly construed." *Bellsouth Telecomm., Inc. v. Dekalb Concrete Prod., Inc.*, 1995 WL 578191 (D.S.C. July 28, 1995) (citing *Morgan & Alston v. D. W. Alderman & Sons' Co.*, 70 S.C. 462, 50 S.E.26, 27 (1905)); *see also Poinsett Constr.*, 301 S.C. at 344, 491 S.E.2d at 876.

Morgan & Alston, *Poinsett,* and *Bellsouth* provide both binding and persuasive authority on how this statute is interpreted in South Carolina. Although *Bellsouth* is only persuasive authority, it is the most recent decision construing the statute. The United States District Court for the District of South Carolina, applying South Carolina law, stated it "must" abide by the strict construction South Carolina courts took in interpreting Section 29-7-10. 1995 WL 578191, *3. In *Morgan & Alston*, the South Carolina Supreme Court looked at the plain meaning of the statute, and stated that it "must be strictly construed," in a finding which has not been overruled since 1905. 70 S.C. 462, 50 S.E.26, 27. Similarly, in *Poinsett*, this Court held the legislature's use of the phrase "first lien" maintains its literal meaning such that the lien is above even perfected security interests and no court "has the authority to construe a statute based on its own notion of whether the statutory scheme is a good idea." 301 S.C. at 344-45, 491 S.E.2d at 876-77.

Contrary to these clear holdings, Appellants argue that Section 29-7-10 is remedial in nature and should be given liberal construction. Appellants only cite interpretation of statutes from other jurisdictions that involve *public* works projects and a South Carolina case interpreting the South Carolina Mechanic's lien statute as support for

this contention. (App. Br., pp. 27-28). Appellants do not cite any cases interpreting Section 29-7-10. As to the interpretation of foreign statutes, known as "Little Miller Acts" because they are the state version of the federal Miller Act, these laws are not persuasive authority and merely establish a lien—*not priority*—for laborers. Therefore, they should not be interpreted in the same manner *solely* because they seek to protect nonpayment as argued by Appellants. South Carolina does not need to adopt a Little Miller Act—or the same method of interpretation—because it already provides for liens for laborers with both a mechanic's lien statute and Section 29-7-10, and those statutes must be interpreted based on their respective language. *Poinsett Constr.*, 301 S.C. at 344, 391 S.E.2d at 876.

Additionally, Appellants cite to *Clo-Car Trucking Co., Inc. v. Clifflure Estates of South Carolina, Inc.*, 282 S.C. 573, 576, 320 S.E.2d 51, 53 (Ct. App. 1984), to support their argument. In *Clo-Car*, the court held that the rule in South Carolina is that *mechanic's lien*—not laborers' liens—statutes are to be given a liberal construction. *Id.* at 576. Appellants argue that because there is similar language in each statute, they should be construed in the same manner. However, the statutes are not identical; otherwise, there would be no need for distinct statutes.[7] Appellants also neglected to cite additional language in *Clo-Car* which provides, "[s]till, [the Court] must take ***each*** mechanic's lien statute as [it] find[s] it for [it is] not at liberty to depart from the plain meaning of its language." *Id.* (emphasis added). The court declined to apply the rule of

[7] Specifically, the South Carolina Mechanic's Lien statute, S.C. Code Ann. § 29-5-10 *et seq.*, requires the subcontractor to file or serve a notice of its lien in order to be accorded priority as against other claimants.

liberal construction to create a lien where none existed or was not intended by the legislature. *Id.* (stating "[s]tatutory liens, . . . , will not be extended to permit a claim not specified by the statute"). Thus, Appellants' arguments are distinguishable, and this Court should follow unanimous, mandatory and persuasive precedent that Section 29-7-10 is strictly applied.

2. Whether Appellants "Laborers" Who Performed "Erection, Alteration, Or Repair" On The Property Is Not At Issue.

Appellants' initial brief devotes substantial argument to an issue not on appeal. Whether Appellants were laborers who participated in the erection, alteration, or repair of buildings is not on appeal. The Special Referee found that Appellants were "'laborers' who were involved in the erection, alteration, or repairing of buildings" under Section 29-7-10. (R. pp. 46-47). Respondents did not appeal that ruling; therefore, any further argument is unnecessary.

3. There Is No Evidence Of Receipt Of Money By Custom Mechanical.

Appellants, however, do not have a lien pursuant to Section 29-7-10 because under the unambiguous, clear language of the statute, there is no evidence Custom Mechanical received the funds from C.R. Meyer. The law is well established that a statutory lien based on Section 29-7-10 does not exist until the contractor has received the money. *Morgan & Austin*, 70 S.C. 462, 50 S.E. 26, 27. The Special Referee properly applied this law and granted summary judgment to Presidential and Security Federal.

Section 29-7-10 provides that laborers "shall have a first lien on the money ***received by such contractor*** for the erection, alteration, or repair of such building." S.C.

Code Ann. § 29-7-10. The plain and usual meaning of the word "receive," although not defined in Black's Law Dictionary, is defined as "to come into possession of" or "acquire." *See* Merriam-Webster.com, http://www.merriam-webster.com/dictionary /receive (last visited Mar. 3, 2014); *see also Poinsett Constr.*, 301 S.C. at 344, 391 S.E.2d at 876 (finding that when a statute is clear and unambiguous, there is no room for construction, and, the terms of the statute must be given their literal meaning).

Custom Mechanical was never in possession of the escrow funds. Custom Mechanical never acquired the escrow funds. Rather, the escrow funds mirror the money at issue in *Morgan & Austin.* In that case, Clark & Bennyfield were contractors hired to construct the Revis building. *Morgan & Austin,* 70 S.C. 462, 50 S.E. at 26. D.W. Alderman & Sons supplied builders' materials to Clark & Bennyfield for use in the erection of the Revis building. *Id.* at 462, 50 S.E. at 26-27. D.W. Alderman & Sons was not paid for its materials and sued against Clark & Bennyfield for the nonpayment of debts owed. *Id.* A warrant was issued and the sheriff attached the debt due by Revis to Clark & Bennyfield for the construction of the Revis building. *Id.*

Morgan & Austin also supplied builders' materials to Clark & Bennyfield for the same project. *Id.* Morgan & Austin sued D.W. Alderman & Sons asserting a prior lien to the monies owed by Revis to Clark & Bennyfield. *Id.* Morgan & Austin tried to assert a first lien under the statute to establish priority over D.W. Alderman & Sons. The court held that a lien under Section 29-7-10 did not exist because Clark & Bennyfield never received the money from Revis; instead, the money was received by the sheriff by virtue of the attachment. *Id.* Because the statute is to be strictly construed, the contractor must

receive the money. Clark & Bennyfield did not receive the money—the sheriff did—thus, Morgan & Austin was not entitled to a statutory first lien. *Id.*

This interpretation was affirmed in *Bellsouth.* 1995 WL 578191. In that case, Southern Bell hired Kelly Green to bury underground telephone cable. Kelly Green subcontracted a portion of the work to Dekalb Concrete Products, Inc., ("Dekalb"). *Id.* at *1. Kelly Green failed to pay Dekalb for its work and also failed to pay the IRS. *Id.* Southern Bell initiated a lawsuit seeking to pay the disputed $8,000 it owed Kelly Green into the registry of the court so that the court could determine the priority of Kelly Green's creditors. *Id.* Dekalb argued it had a first lien (over the IRS) to the Southern Bell proceeds because it provided labor pursuant to Section 29-7-10. *Id.* at *2. The court disagreed because the "statutory lien created by Section 29-7-10 does not come into existence until the contractor has received the money." *Id.* at *3 (citing *Morgan & Alston*, 50 S.E.2d 26). Kelly Green never received the money because it was being held pending a resolution of the creditor dispute. *Id.* Accordingly, there could be no lien.

Similarly, Custom Mechanical has not received or come into possession of the escrow funds. After C.R. Meyer and Custom Mechanical settled the Arbitration Award for $2,000,000, the Court ordered C.R. Meyer to pay the money into the escrow account of Richardson Plowden & Robinson, P.A. (R. p. 24). One Million Eight Hundred Thousand Dollars ($1,800,000) of the $2,000,000 settlement ($200,000 was expressly designated as attorneys' fees) was to be held for the benefit of Custom Mechanical's creditors until priority was determined by the court. (R. pp. 24-25). This money was never considered the property of Custom Mechanical. Rather, Custom Mechanical

requested that the money be placed into escrow, and Paragraph 3 of the Settlement Order informed Custom Mechanical of how it could come into possession of a portion of the Arbitration Award. (R. p. 25). Specifically, "Custom [Mechanical] shall be entitled to assert any priority to the funds. The funds being held pursuant to this paragraph shall be disbursed pursuant to further Order of the Court." *Id.* Additionally, all parties agreed that Custom Mechanical should not receive the funds due to its precarious financial situation. Therefore, it is disingenuous of Appellants to argue that Custom Mechanical received the money because the purpose of the escrow account was to keep the money out of the hands of Custom Mechanical.

Appellants' argument that the money was received by Richardson Plowden & Robinson, P.A. as Custom Mechanical's agent equally fails. Although it is the case that Richardson Plowden & Robinson, P.A. was an agent for Custom Mechanical in this litigation, the funds were always encumbered by the claims which exceeded the amount of funds; therefore, they were never received by Custom Mechanical. In fact, if Custom Mechanical received the funds unencumbered, Appellants could have attached them with their Warrant of Attachment. However, they could not because Custom Mechanical did not own the escrow funds. Additionally, Custom Mechanical never could have directed Richardson Plowden & Robinson, P.A. to do anything with the money as its agent since the funds could only be released by order of the Court, and Custom Mechanical had to prove, which it never has, any right to the funds. Under black letter law, an agent cannot have greater rights than the principal. Therefore, because Custom Mechanical had no right to the money and had to prove any claim to the funds, it does not matter that the

money was placed into the escrow account of its attorneys. The funds were always restricted, encumbered, and unable to be disbursed except by order of the court. Thus, Custom Mechanical never received the money, and the statutory lien does not attach.

D. Even If This Court Remands To The Circuit Court, The Circuit Court Properly Held There Is A Distinction Between The Amount Covered By The Statutory First Lien And The Confession Of Judgment.

Even if this Court remands the matter to the circuit court for a determination of the lien under Section 29-7-10, the Special Referee properly found that Appellants would have to prove the amount of their damages—not rely upon their confession of judgment from unrelated litigation to which Presidential and Security Federal were not parties. For the reasons below, this Court should affirm that the only amounts on which Appellants could have a first lien are those they can prove under Section 29-7-10.

1. The plain language of Section 29-7-10 provides a first lien only for payment of lawful services in proportion to the amount of the claim.

In its plain language, Section 29-7-10 provides a first lien "for [a laborer's] lawful services . . . furnished out of the money received for the erection, alteration, or repairs of buildings . . . on the money received . . . in proportion to the amount of their respective claims." Thus, Section 29-7-10 provides that a first lien only attaches for the amounts of those lawful services that a laborer can prove relate to the erection, alteration, or repair of a building. The statute says absolutely nothing about using numbers contained in a confession of judgment to determine the amount of the lien. Accordingly, under the plain

and literal language of Section 29-7-10, the Special Referee properly found that should a lien attach, the amount of the lien must be determined by proof offered by Appellants.

Trying to base the amount of wages owed under Section 29-7-10 on a confession of judgment is simply not supported anywhere in the case law. Although Appellants claim that any first lien received should be for the amount of their confession of judgment, $275,000 plus post-judgment interest, the statute does not establish a first lien for treble damages, attorney's fees, or costs. Appellants have even admitted that the amount *they* calculated for wages that were not paid is much less than the $275,000 they claim. (R. p. 445, line16-p. 446, line 6; p. 468, lines 3-6). Notably, on Appellants' *best day*, meaning that they are *each* able to prove their *entire* time on the project was spent erecting, altering, or repairing such that the proportionate amounts owed to them for those services would be 100% of what was withheld, Appellants are only entitled to $50,632.76—a far cry from the $275,000 claimed and the $325,000 of the remaining escrow funds. (R. pp. 497-526). Accordingly, the Special Referee properly determined that the statute is clear that the amount of a first lien under Section 29-7-10 would have to be determined by evidence of such work and the related wages earned.

2. The Special Referee properly refused to consider Appellants' attempted reliance upon the confession of judgment and the Wage Payment Act to establish damages.

The claims and resulting confession of judgment in Appellants' prior litigation involving this issue were appropriately refused by the Special Referee because the Wage Payment Act was never pled in this action and neither the Wage Payment Act nor the confession of judgment gives the employees a first lien.

a. Appellants did not plead a cause of action under Section 41-10-10 *et seq.* and are bound by their pleadings.

Appellants cannot rely upon their claims or confession of judgment to establish damages in this matter because nowhere in their pleadings do Appellants make a claim to the arbitration proceeds pursuant to section 41-10-10 *et seq.*[8] Therefore, they are unable to assert a right to recovery based on the statute because they are "judicially bound by their pleadings." *Charleston County Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 425, 559 S.E.2d 362, 364 (2001) (stating "[i]t is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise") (quoting *Postal v. Mann,* 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992)).

b. Neither Section 41-10-10 *et seq.* nor the confession of judgment gives Appellants priority.

The Wage Payment Act, S.C. Code Ann. Section 41-10-10 *et seq.*, does not give Appellants first priority even if they could prove their Wage Payment Act claims; therefore, relying on the Wage Payment Statute does not support Appellants' arguments that they are entitled to a first lien on the Arbitration Award.

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[8] Although Appellants pled a claim pursuant to section 41-10-10 *et seq.* in their amended complaint in Aiken County, Civil Action Number 2008-CP-02-413, Appellants did not incorporate that complaint by reference in this action, so they may not use those allegations in this matter. Rather, in their initial answer to Custom Mechanical's third-party Complaint, Appellants asserted an interest in "$275,000 of said arbitration proceeds and post-judgment interest." (R. p.255, para. 4). In Appellants' Joint Reply, they denied Presidential' s and Security Federal's secured interests had priority and asserted they should be awarded declaratory judgment under S.C. Code Ann. section 15-53-10 because they had priority based on the "first lien" created pursuant to S.C. Code Ann. Section 29-7-10. (R. p.286, paras. 21-23, 26-p.287, para. 35).

While the Wage Payment Act establishes how much an employer owes an employee, it does not establish whether the employee's judgment under the Wage Payment Act has priority over other creditors of the employer. *See* S.C. Code Ann. § 41-10-10, *et seq.* Appellants appear to argue they had an independent claim against Custom Mechanical and Custom Industrial under the Wage Payment Act for which Custom Mechanical and Custom Industrial confessed judgment, and that judgment "*undergirds the lien*" they have pursuant to Section 29-7-10. (App. Br., p.23) (emphasis added). Interestingly, Appellants did not cite any authority to support that argument. In fact, there is no case law in South Carolina—in state or federal court—which discusses both statutes as part of the same case. Thus, without any authority, Appellants may not bootstrap allegations under Section 41-10-10 *et seq.* to Section 29-7-10 to create both priority under Section 29-7-10 and damages under the Wage Payment Act.

Moreover, Appellants' outstanding confession of judgment, relating to a claim under a different statute, is not relevant to this lawsuit at all since secured interests, such as those held by Presidential and Security Federal, take priority over judgment liens. S.C. Code Ann. § 36-9-317(a); *J.M. Smith Corp. v. In re Greenwood Petroleum Co., Inc.*, 341 S.C. 442, 535 S.E.2d 131 (2000) (finding that a secured party who perfects its security interest before a creditor acquires a lien upon the collateral by "attachment, levy, or the like" has priority over the lien creditor). Consequently, the Court properly refused to consider such an outrageous claim.

II. This Court Should Affirm The Remaining Grounds Found By The Special Referee That Appellants Cannot Prove Their Claims.

A. The Litigation and Settlement of the Union's claim bars Appellants' claim.

Appellants' claim for the vacation funds cannot be sustained because the union has already brought claims on their behalf, including in the present litigation. In his Summary Judgment Order, the Special Referee found that the employees could elect, *through the union*, to have a percentage of their weekly wages deducted and those withholdings set aside in a savings fund. Therefore, the unpaid vacation funds were owed to the union—not to Appellants directly—meaning that the union is the rightful owner of the claim for those funds. Since those funds were owed to the union, which had previously litigated and resolved its claims against both Custom Industrial and Custom Mechanical on behalf of the fund's beneficiaries—otherwise known as Appellants and any other vacation fund contributors who are not parties to this action, the funds received from that settlement should have been directed back to the beneficiaries. Accordingly, Appellants do not have an independent claim for the same monies. Appellants argue that the Court erred because the Custom entities never paid the wages to the union so the union could not in turn pay them to the employees. While it may be accurate that the union never received the wages from the Custom entities, that fact does not create privity between Appellants and Custom Mechanical.

There is no privity of contract for vacation funds between Appellants and Custom Industrial, much less between Appellants and Custom Mechanical. One not in privity of contract with another cannot maintain an action against him and damage resulting from

the breach of a contract between the defendant and a third-party is not recoverable by the plaintiff. *See Bob Hammond Constr. Co., Inc. v. Banks Constr. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994)(citations omitted). The vacation funds were withheld pursuant to a collective bargaining agreement ("CBA") between Custom Industrial and the union. (R. pp. 634-643; p.647, para. 8-p.648, para. 12). The wages for employees on the Project were paid by Custom Industrial, so the vacation fund money was also funded by Custom Industrial. (R. p. 494, para. 3; pp.497-526; pp.657-679). If there is money owed to these employees, it is owed by the union. The union sued Custom Industrial on behalf of the fund's beneficiaries, *i.e.* Appellants, and has already obtained a judgment. Additionally, the union settled and dismissed its claims in the current litigation. Accordingly, Appellants cannot sustain a claim in the current action, and the Special Referee's Order should be affirmed.

B. Appellants Are Not Creditors Of Custom Mechanical.

Appellants cannot maintain an action as a creditor of Custom Mechanical under Section 29-7-10. Appellants were employed by Custom Industrial, voluntarily elected for Custom Industrial to withhold and send wages to the union, and have no evidence Custom Industrial did not receive the vacation money from Custom Mechanical.

Any debt owed for unpaid vacation wages is due to the union for their benefit—not to Appellants directly. Appellants, by pursuing only the vacation funds, admit that they were paid the other eighty-five to ninety-five percent of their wages during March 2007 through July 2007. While Appellants have alleged the vacation funds were not paid to the union, they have never pled or presented any evidence that Custom Mechanical

withheld the vacation funds while paying Custom Industrial the remaining wages for Appellants. Custom Mechanical is the only Custom entity that is a party to this lawsuit, and the escrow funds are to benefit the *creditors* of Custom Mechanical. (R. p.25, para. 3; p.238, para. 1-p.239, para. 8; pp.474-483). Since theories for piercing the corporate veil or alter ego or amalgamation of interests have been neither properly alleged nor proved, Appellants cannot combine the two entities to serve their own purposes.[9] *Mid-S. Mgt. Co., Inc.*, 374 S.C. at 597, 649 S.E.2d at 140-41 (finding that a the debts of a corporation are not the individual debts of, its officers and stockholders, and the burden of proof rests with the party seeking to disregard the corporate entity). Custom Mechanical and Custom Industrial are separate corporate entities, and as such, Custom Industrial paid Appellants' wages. (R. p. 494, para. 3; pp.497-526; pp.657-679). Appellants are not creditors of Custom Mechanical; therefore, the Special Referee properly held Appellants cannot maintain their claim against Custom Mechanical pursuant to Section 29-7-10.

CONCLUSION

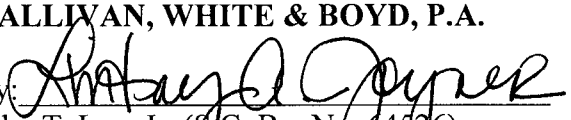
The Special Referee properly granted summary judgment to Respondents Presidential and Security Federal. Appellants cannot establish priority because they cannot establish a statutory lien under Section 29-7-10 since Custom Mechanical never received the money from the Arbitration Award as it was always restricted and encumbered. Moreover, even if Appellants were entitled to a statutory lien, they cannot

[9] Indeed, as argued in section I.B, *supra*, Appellants have not preserved this argument for appellate review.

rely on a cause of action and/or a confession of judgment from a wholly separate case to prove the amount entitled to statutory priority; therefore, the Special Referee correctly found that even if a lien did attach, Appellants would have to prove the amounts subject to a first lien under the statute. Based upon the foregoing, Presidential Financial and Security Federal respectfully request this Court to affirm.

Respectfully submitted,

GALLIVAN, WHITE & BOYD, P.A.

By: 

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Columbia, South Carolina
July 7, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

James C. Williams, Jr., Special Referee

Case No. 2010-CP-40-8621

Appellate Case No. 2013-001839

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

v.

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

And

Custom Mechanical CSRA, LLC is . . . . . Third-Party Plaintiff/
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

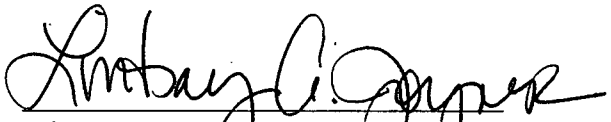
#709, International Association of Bridge Structural, Ornamental and Reinforcing Iron Workers; Southeastern Carpenters and Millwrights Health Trust, Southeastern Carpenters and Millwrights Pension Trust, Larry Phillips and J. Kirk Malone, as Trustees of these Funds; Ferguson Enterprises, Inc.; Presidential 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. Griffin, 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. Griffin, 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. are . . . . . Appellants

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

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certify that the Final Brief of Respondents Presidential Financial Corporation & Security Federal Bank complies with Rule 211(b), SCACR and the August 13, 2007, Order from the South Carolina Supreme Court titled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in the Appellate Court Filings," as amended by the April 15, 2014, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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