

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

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

Case No. 2007-CP-04-2785
(Appellate Case No. 2012-213225)

Moorhead Construction, Inc.....Respondent,

v.

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

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

INITIAL BRIEF OF APPELLANT

Thomas E. Dudley, III, Esquire
M. Stokely Holder, Esquire
Kenison, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601
Ph. 864.242.4899
Fax 864.242.4844

Other Counsel of Record:

David J. Brousseau, Esquire
McIntosh, Sherard, Sullivan & Brousseau
P.O. Box 197
Anderson, SC 29622
Attorney for Respondent

RECEIVED

MAR 05 2013

SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	3
STATEMENT OF FACTS.....	8
ARGUMENT	14
I. DID THE LOWER COURT ERR IN FINDING THE APPELLANT PERSONALLY LIABLE UNDER THE RESPONDENT'S MECHANIC'S LIEN CLAIM?	14
II. DID THE LOWER COURT PROPERLY FIND A PARTY LIABLE FOR ANY UNDERLYING DEBT OWED TO RESPONDENT UNDER RESPONDENT'S MECHANIC'S LIEN CLAIM?	15
III. DID THE LOWER COURT ERR IN FINDING THE RESPONDENT'S MECHANIC'S LIEN WAS FILED IN ACCORDANCE WITH THE TIME LIMITATIONS FOUND IN S.C. CODE ANN. §§ 29-5-90 AND 29-5-120?	17
IV. IS THE APPELLANT'S LIABILITY, IF ANY, UNDER THE RESPONDENT'S MECHANIC'S LIEN CLAIM LIMITED TO THE BALANCE DUE BY THE OWNERS OF EACH LIENED TRACT AT THE TIME THE OWNERS RECEIVED NOTICE FROM RESPONDENT OF THE ALLEGED DEBT DUE?.....	30
A. IS THE APPELLANT'S LIABILITY UNDER RESPONDENT'S MECHANIC'S LIEN ON 'TRACT A' LIMITED TO THE BALANCE FOUND DUE BY APPELLANT TO THE RESPONDENT AT THE TIME THE APPELLANT RECEIVED NOTICE FROM RESPONDENT?	31
B. IS THE APPELLANT'S LIABILITY UNDER RESPONDENT'S MECHANIC'S LIEN ON 'THE 2 ACRE TRACT' LIMITED TO THE BALANCE FOUND DUE BY THE OWNER OF 'THE 2 ACRE TRACT' (PENDLETON STATION, LLC) TO THE RESPONDENT AT THE TIME PENDLETON STATION, LLC RECEIVED NOTICE OF SAME FROM RESPONDENT?	32
C. IS THE APPELLANT'S LIABILITY UNDER RESPONDENT'S MECHANIC'S LIEN ON 'TRACT B' LIMITED TO THE BALANCE FOUND DUE BY THE OWNER OF TRACT B (DIANA L. ZELLNER, TRUSTEE FOR THE DIANA L. ZELLNER REVOCABLE TRUST UAD) TO THE RESPONDENT AT THE TIME THE OWNER OF TRACT B RECEIVED NOTICE FROM RESPONDENT?	32
V. DID THE LOWER COURT ERR IN ENFORCING THE RESPONDENT'S MECHANIC'S LIEN ON 'TRACT A' AGAINST THE PREVIOUSLY RECORDED AND UNSATISFIED MORTGAGE OF APPELLANT?.....	33

VI.	DID THE LOWER COURT ERR IN FINDING THAT NEITHER THE PRIOR MORTGAGE NOR PRIOR DEED TO APPELLANT WAS SENIOR IN PRIORITY TO RESPONDENT'S SUBSEQUENTLY FILED MECHANIC'S LIEN AGAINST 'TRACT A'?	34
VII.	DID THE LOWER COURT ERR IN ITS FINDING ON THE DOCTRINE OF MERGER?	35
A.	DID THE LOWER COURT ERR IN ISSUING AN ORDER ON THE DOCTRINE OF MERGER IN LIGHT OF THE LOWER COURT'S AFFIRMATION ON THE RECORD THAT ANY STATEMENTS IT HAD MADE REGARDING MERGER IN THIS CASE SHOULD ONLY BE CONSIDERED 'DICTUM'?	35
B.	DID THE LOWER COURT'S ORDER ON THE DOCTRINE OF MERGER VIOLATE THE LAW IN THIS STATE THAT ONE LOWER COURT JUDGE DOES NOT HAVE THE POWER TO REVIEW, MODIFY, AFFIRM OR REVERSE THE FINDINGS OF ANOTHER LOWER COURT JUDGE?	37
C.	DID THE LOWER COURT ERR IN ITS INTERPRETATION AND APPLICATION OF THE CURRENT LAW ON MERGER IN THIS STATE?	37
VIII.	DID THE LOWER COURT ERR IN INCLUDING THE PLAINTIFF'S LOST BOND PREMIUM AMOUNT IN THE AMOUNT THE LOWER COURT AWARDED THE RESPONDENT UNDER ITS MECHANIC'S LIEN CLAIM?	43
IX.	DID THE LOWER COURT ERR IN INCLUDING PRE-JUDGMENT INTEREST IN THE AMOUNT THE COURT AWARDED THE RESPONDENT AS AGAINST THE BANK?	45
X.	DID THE LOWER COURT ERR IN FINDING THAT THE RESPONDENT WAS THE 'PREVAILING PARTY' UNDER THIS STATE'S MECHANIC'S LIEN STATUTE?	48
XI.	DID THE LOWER COURT ERR IN THE AMOUNT OF ATTORNEY FEES THAT IT AWARDED RESPONDENT?	55
	CONCLUSION	57

TABLE OF AUTHORITIES

CASES

<u>Ad. Coast Lumber Corp. v. Morrison</u> , 152 S.C. 305, 309-10, 149 S.E. 243, 245 (1929).....	15
<u>Atlee Electric Company, Inc. v. Johnson Construction Co.</u> , 14 Ill.App.3d 716, 303 N.E.2d 192 (1973).....	44
<u>Binkley v. Burry</u> , 352 S.C. 286, 573 S.E.2d 838 (2002).....	37
<u>Blackwell v. Powell</u> , 346 S.E.2d 731 (S.C.Ct.App. 1986).....	16
<u>Bleckley v. Branyan</u> , 26 S.C. 424, 2 S.E.2d 319 (1887).....	38, 39, 40
<u>Blumberg v. Nealco, Inc.</u> , 310 S.C. 492, 427 S.E.2d 659 (1993).....	56
<u>Butler Contracting, Inc. v. Court Street, LLC</u> , 369 S.C. 121, 631 S.E.2d 252 (2006).....	18, 19, 20, 27, 28, 29, 46
<u>Cedar Creek Properties v. Cantelou Associates, Inc.</u> , 320 S.C. 483, 465 S.E.2d 774 (Ct.App. 1995).....	52, 54
<u>Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.</u> , 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003).....	21, 28
<u>Collins v. Collins</u> , 239 S.C. 170, 122 S.E.2d 1 (1961).....	56
<u>Dodgens v. Kent Mfg. Co.</u> , 955 F. Supp. 560, 21 A.D.D. 192 (D.S.C. 1997) (applying South Carolina law).....	20, 28
<u>Enoree Baptist Church v. Fletcher</u> , 287 S.C. 602, 340 S.E.2d 546 (1986).....	37
<u>First Fed. Sav. And Loan Ass'n of S. Carolina v. Finn</u> , 300 S.C. 228, 287 S.E.2d 253 (1989).....	40
<u>Glidden Coatings & Resins, Div. of SCM Corp. v. Suitt Construction Co., Inc.</u> , 290 S.C. 240, 244, 349 S.E.2d 89, 91-92 (1986).....	16
<u>Gray v. Walker</u> , 16 S.C. 143, 146 (1881).....	18
<u>Guignard Brick Works v. Gantt</u> , 251 S.C. 29, 159 S.E.2d 850 (1968).....	15, 18
<u>Hardin Constr. Group, Inc. v. Carlisle constr. Co.</u> , 300 S.C. 456, 388 S.E.2d 794 (1990).....	44

<u>JRS Builders Inc., v. Neunsinger</u> , 364 S.C. 596, 614 S.E.2d 629 (2005).....	49
<u>Keeney’s Metal Roofing, Inc. v. Palmieri</u> , 345 S.C. 550, 554-555, 548 S.E.2d 900, 902-903 (2001).....	54
<u>Kirkman v. Parex, Inc.</u> , 369 S.C. 477, 632 S.E.2d 854 (2006).....	39
<u>Lauro v. Visnapu</u> , 351 S.C. 507, 518-519, 570 S.E.2d 551, 557 (2002).....	48, 49
<u>Layman v. State</u> , 376 S.C. 434, 658 S.E.2d 320 (2008).....	56
<u>Lowndes Hill Realty Co. v. Greenville Concrete Co.</u> , 229 S.C. 619, 93 S.E.2d 855 (1956).....	17, 30
<u>McCraney v. Morris</u> , 170 S.C. 250, 170 S.E. 276, at 279, 95 A.L.R. 622 (1933).....	38, 39, 40, 43
<u>McCreary v. Coggeshall</u> , 74 S.C. 42, 53 S.E. 978 (1906).....	38, 39, 40
<u>Metz v. Critcher</u> , 83 S.C. 396, 65 S.E. 394 (1909).....	14
<u>Nash v. Tindall Corp.</u> , 375 S.C. 36, 650 S.E.2d 81 (2007).....	36
<u>Norwood v. Norwood</u> , 36 S.C. 331, 15 S.E. 382, 384 (1892).....	34
<u>Owings v. Graham</u> , 120 S.C. 408, at 448, 113 S.E. 279 (1922).....	38, 40
<u>Preferred Sav. & Loan Ass’n v. Royal Garden Resort, Inc.</u> , 301 S.C. 1, 389 S.E.2d 853 (1990).....	19
<u>S. Welding Works, Inc. v. K & S Const. Co.</u> , 286 S.C. 158, 164-65, 332 S.E.2d 102, 106 (Ct. App. 1985).....	47
<u>S.C. Department of Transportation v. Revels</u> , 399 S.C. 423, 731 S.E.2d 897 (Ct.App. 2012).....	56
<u>Sea Pines Co. v. Kiawah Island Co.</u> , 268 S.C. 153, 232 S.E.2d 501 (1977).....	15
<u>Seckinger v. Vessel Excalibur</u> , 483 S.E.2d 775, 326 S.C. 382 (Ct. App.1997).....	48, 49
<u>Sentry Eng’g & Constr., Inc. v. Mariner’s Cay Dev. Corp.</u> , 287 S.C. 346, 338 S.E.2d 631 (1985).....	44
<u>Skiba v. Gessner, Id.</u> ; 374 S.C. 208, 648 S.E.2d 605 (2007).....	16, 31

<u>Smythe v. Monash</u> , 109 S.C. 82, 85, 95 S.E. 138, 139 (1918).....	14
<u>State ex rel Medlock v. Love Shop Ltd.</u> , 286 S.C. 486, 334 S.E.2d 528 (1985)...	37
<u>Taylor Cotton and Ridley Inc. v. Okatie Hotel Group, LLC</u> , 372 S.C. 89, 641 S.E.2d 459 (2007).....	30
<u>Tenny v. Anderson Water, Light & Power Co.</u> , 67 S.C. 11, 45 S.E. 111 (1903).....	14
<u>The Lite House v. J.C. Roy Co., Inc.</u> , 309 S.C. 50, 419 S.E.2d 817 (Ct App. 1992).....	34
<u>T.W. Morton Builders, Inc., v. von Buedingen</u> , 316 S.C. 388, 450 S.E.2d 87 (Ct. App. 1994).....	46, 47
<u>Tzouvelekas v. Tzouvelekas</u> , 206 S.C. 90, 33 S.E.2d 73, 75 (1945).....	40
<u>Utilities Const. Co., Inc. v. Wilson</u> , 321 S.C. 244, 468 S.E.2d 1 (Ct. App. 1996).....	57
<u>Williams v. Vanvolkenburg</u> , 312 S.C. 373, 440 S.E.2d 408 (Ct. App. 1994).....	14
<u>Wood v. Hardy</u> , 235 S.C. 131, 138, 110 S.E.2d 157, 160 (1959).....	17, 19, 20, 27, 28, 30
<u>Zepa Construction, Inc. v. Randazzo</u> , 357 S.C. 32, 591 S.E.2d 29 (Ct.App. 2004).....	44

STATUTES

S.C. Code Ann. § 29-5-10.....	4, 6, 15-18, 21, 29, 30, 43, 48-52, 54-56
S.C. Code Ann. § 29-5-10(b) (Supp.2001).....	48, 49, 55
S.C. Code Ann. § 29-5-20.....	30
S.C. Code Ann. § 29-5-40.....	30
S.C. Code Ann. § 29-5-70.....	33,34
S.C. Code Ann. § 29-5-90.....	1, 17, 21, 29, 33
S.C. Code Ann. § 29-5-120.....	1, 17, 21, 29

S.C. Code Ann. § 29-5-170.....	5, 52
S.C. Code Ann. § 30-7-10.....	34
S.C. Code Ann. § 34-31-20.....	46

OTHER AUTHORITIES

o

30 S.C. Jur. Contracts § 47.....	20, 28
22 S.C. Jur. Mechanics' Liens § 4.....	16

STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR IN FINDING THE APPELLANT *PERSONALLY* LIABLE UNDER THE RESPONDENT'S MECHANIC'S LIEN CLAIM?
- II. DID THE LOWER COURT PROPERLY FIND A PARTY LIABLE FOR ANY UNDERLYING DEBT OWED TO RESPONDENT UNDER RESPONDENT'S MECHANIC'S LIEN CLAIM?
- III. DID THE LOWER COURT ERR IN FINDING THE RESPONDENT'S MECHANIC'S LIEN WAS FILED IN ACCORDANCE WITH THE TIME LIMITATIONS FOUND IN S.C. CODE ANN. §§ 29-5-90 AND 29-5-120?
- IV. IS THE APPELLANT'S LIABILITY, IF ANY, UNDER THE RESPONDENT'S MECHANIC'S LIEN CLAIM LIMITED TO THE BALANCE DUE BY THE OWNERS OF EACH LIENED TRACT AT THE TIME THE OWNERS RECEIVED NOTICE FROM RESPONDENT OF THE ALLEGED DEBT DUE?
 - A. IS THE APPELLANT'S LIABILITY UNDER RESPONDENT'S MECHANIC'S LIEN ON 'TRACT A' LIMITED TO THE BALANCE FOUND DUE BY APPELLANT TO THE RESPONDENT AT THE TIME THE APPELLANT RECEIVED NOTICE FROM RESPONDENT?
 - B. IS THE APPELLANT'S LIABILITY UNDER RESPONDENT'S MECHANIC'S LIEN ON 'THE 2 ACRE TRACT' LIMITED TO THE BALANCE FOUND DUE BY THE OWNER OF 'THE 2 ACRE TRACT' (PENDLETON STATION, LLC) TO THE RESPONDENT AT THE TIME PENDLETON STATION, LLC RECEIVED NOTICE OF SAME FROM RESPONDENT?
 - C. IS THE APPELLANT'S LIABILITY UNDER RESPONDENT'S MECHANIC'S LIEN ON 'TRACT B' LIMITED TO THE BALANCE FOUND DUE BY THE OWNER OF TRACT B (DIANA L. ZELLNER, TRUSTEE FOR THE DIANA L. ZELLNER REVOCABLE TRUST UAD) TO THE RESPONDENT AT THE TIME THE OWNER OF TRACT B RECEIVED NOTICE FROM RESPONDENT?
- V. DID THE LOWER COURT ERR IN ENFORCING THE RESPONDENT'S MECHANIC'S LIEN ON 'TRACT A' AGAINST THE PREVIOUSLY RECORDED AND UNSATISFIED MORTGAGE OF APPELLANT?
- VI. DID THE LOWER COURT ERR IN FINDING THAT NEITHER THE PRIOR MORTGAGE NOR PRIOR DEED TO APPELLANT WAS SENIOR IN

PRIORITY TO RESPONDENT'S SUBSEQUENTLY FILED MECHANIC'S LIEN AGAINST 'TRACT A'?

- VII. DID THE LOWER COURT ERR IN ITS RULING ON THE DOCTRINE OF MERGER?
 - A. DID THE LOWER COURT ERR IN ISSUING AN ORDER ON THE DOCTRINE OF MERGER IN LIGHT OF THE LOWER COURT'S AFFIRMATION ON THE RECORD THAT ANY STATEMENTS IT HAD MADE REGARDING MERGER IN THIS CASE SHOULD ONLY BE CONSIDERED 'DICTUM'?
 - B. DID THE LOWER COURT'S ORDER ON THE DOCTRINE OF MERGER VIOLATE THE LAW IN THIS STATE THAT ONE LOWER COURT JUDGE DOES NOT HAVE THE POWER TO REVIEW, MODIFY, AFFIRM OR REVERSE THE FINDINGS OF ANOTHER LOWER COURT JUDGE?
 - C. DID THE LOWER COURT ERR IN ITS INTERPRETATION AND APPLICATION OF THE CURRENT LAW ON MERGER IN THIS STATE?
- VIII. DID THE LOWER COURT ERR IN INCLUDING THE PLAINTIFF'S LOST BOND PREMIUM AMOUNT IN THE AMOUNT THE LOWER COURT AWARDED THE RESPONDENT UNDER ITS MECHANIC'S LIEN CLAIM?
- IX. DID THE LOWER COURT ERR IN INCLUDING PRE-JUDGMENT INTEREST IN THE AMOUNT THE COURT AWARDED THE RESPONDENT AS AGAINST THE APPELLANT?
- X. DID THE LOWER COURT ERR IN FINDING THAT THE RESPONDENT WAS THE 'PREVAILING PARTY' UNDER THIS STATE'S MECHANIC'S LIEN STATUTE?
- XI. DID THE LOWER COURT ERR IN THE AMOUNT OF ATTORNEY FEES THAT IT AWARDED RESPONDENT?

STATEMENT OF THE CASE

On April 17, 2007, Respondent, Moorhead Construction, Inc. ("Moorhead"), filed one Mechanic's Lien ("Moorhead Lien") against four (4) separate pieces of real property. [Moorhead Lien] In the Moorhead Lien, Moorhead alleged that it was owed \$401,729.00 for work that it allegedly performed on the four separate parcels. Moorhead also alleged in its lien that its last date of work was on March 6, 2007.

On August 31, 2007, Moorhead filed a Complaint against Pendleton Station, LLC ("PSL"), Enterprise Bank of South Carolina (the "Bank"); Diana L. Zellner, Trustee for the Diana L. Zellner Revocable Trust UAD ("Zellner"); Angelo Penza; Bobby Bryant; Ursula Lesser; Roger Rowe; and Benjamin L. Daniel. [Compl.] The Complaint included the following three causes of action, each of which was made against all Defendants: (1) Breach of Contract; (2) Unjust Enrichment; and (3) Foreclosure of Mechanic's Lien. Moorhead specifically pled in each cause of action that it was damaged under the specific cause of action in the amount of \$401,729.00.

The Bank filed its Answer denying all of Moorhead's claims. [Ans.] The Bank alleged in defense, *inter alia*, that Plaintiff's claims were barred because the Bank had no legal or equitable duty to pay Moorhead for any work alleged to have been performed by Moorhead, and because both the prior deed to the Bank and the Bank's prior, unsatisfied mortgage were senior to Moorhead's subsequent mechanic's lien as against two of the four lien properties.

The Plaintiff conducted no discovery in this case.

After the Bank was served with Moorhead's lien and lawsuit, the Bank made several good faith attempts to get Moorhead to dismiss the claims against the Bank and

the property, all to no avail. [Trial Transcript Dec. 8, 2011, p. 6, line 14 thru p. 8, line 14] So, the Bank served written discovery on Moorhead on June 3, 2008; however, Moorhead did not timely respond to the Bank's Interrogatories and Requests for Production. After numerous attempts by the Bank to resolve the outstanding discovery failed, the Bank filed a Motion to Compel on June 8, 2009. While that Motion to Compel was pending, the Bank served a Rule 30(b)(6), SCRCF, Notice of Deposition on Moorhead together with a Notice of Deposition on Moorhead's principal, Kevin Moorhead. The depositions took place on September 14, 2009. On September 9, 2009, after more than fifteen (15) months from being served, Moorhead served its responses to the Bank's Interrogatories, which included some documents- resolving the outstanding Motion to Compel.

The Bank filed a Motion for Partial Summary Judgment on December 2, 2009 seeking, *inter alia*, the dismissal of Moorhead's Breach of Contract claim against the Bank and the dismissal of Moorhead's Mechanic's Lien. As part of the Bank's Motion regarding cancellation of Moorhead's Lien, the Bank asked for attorneys' fees and costs pursuant to S.C. Code Ann. § 29-5-10, *et seq.* That Motion was heard on September 10, 2010. By Order of the Honorable J. Cordell Maddox, Jr. ("Maddox Order"), the Bank's Motion was granted with respect to Moorhead's Breach of Contract claim against the Bank, and with respect to Moorhead's Mechanic's Lien on one of the four liened properties- "The 38 Acre Tract". [Maddox Order] Judge Maddox did not rule on the Bank's request for attorneys' fees and costs. So, prior to the case being tried, the Bank filed a Motion for an Award of Attorneys' Fees and Costs ("Atty Fee Motion") on October 5, 2011. [Atty Fee Motion]

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

Due to the factual similarities between Moorhead's lawsuit and the separate lawsuits filed by Moorhead's two subcontractors¹, the lower court tried all three (3) cases at the same time. [**Trial Transcript Dec. 8, 2011, p. 6, lines 1-7**] However, none of the three lawsuits (or any of the three separate mechanic's liens at issue in each) were ever consolidated pursuant to S.C. Code Ann. § 29-5-170, or otherwise. [**Moorhead Order, p. 2**] Prior to taking testimony at trial, the lower court heard the Bank's previously filed Motion for an Award of its Attorneys' Fees and Costs.² [**Trial Transcript Dec. 8, 2011, p. 7, line 17 thru p. 9, line 21**] The lower court withheld from ruling on the Motion until the resolution of Moorhead's lien claim against the remaining three lien properties.

At the close of Moorhead's case, the Bank moved for directed verdict as to Moorhead's two remaining causes of action against the Bank – Foreclosure of Mechanic's Lien and Unjust Enrichment. [**Trial Transcript Dec. 8, 2011, p. 140, line 13 thru p. 145, line 5**] Moorhead argued that the lower court should deny the Motion

¹ Miller Construction Company, Inc. ("Miller") and Craft Construction Company, Inc. of Starr ("Craft")

² Also prior to taking testimony, Moorhead agreed to voluntarily dismiss Defendants Zellner, Bobby Bryant, Ursula Lesser, Roger Rowe and Benjamin L. Daniel. The lower court subsequently signed a "Pre-trial Order Regarding Dismissal of Certain Parties". [**Pre-trial Order Regarding Dismissal of Certain Parties**] This left only the Bank, PSL and Angelo Penza as Defendants – with claims against only the former two.

because there was sufficient evidence entered into the record to support Moorhead's claims. The lower court denied the Bank's Motion for Directed Verdict.

At the close of the Bank's case, after brief reply testimony, and after brief questioning by the lower court, the lower court immediately ruled on Moorhead's claims. **[Trial Transcript Dec. 8, 2011, p. 206, lines 16-24]** The lower court concluded that of the \$261,032.81 total that Moorhead was seeking at trial under its (unamended \$401,729.00) lien claim, Moorhead was not entitled to recover the \$194,405.00 it alleged it was owed for "Lost Home Office Overhead". The lower court concluded, however, that Moorhead should be awarded \$32,985.81 representative of retainage found to be owed to Moorhead; \$33,642.00 representative of "lost bond premiums" found to be owed to Moorhead; and Pre-judgment Interest. The lower court ordered the record remain open pending a subsequent hearing before it on the S.C. Code Ann. § 29-5-10, *et seq.* "prevailing party" issue. **[Trial Transcript Dec. 8, 2011, p. 208, lines 2-11]**

A subsequent hearing was scheduled for January 24, 2012. **[Trial Transcript Jan. 24, 2012, pp. 1-5]** At the hearing, the lower court immediately concluded that Moorhead was the "prevailing party" in accordance with S.C. Code Ann. § 29-5-10, *et seq.* **[Trial Transcript Jan. 24, 2012, p. 26, line 12 thru p.27, line 11]** The lower court decided, *sua sponte*, at the hearing that Moorhead should be awarded attorneys' fees in the amount of \$39,000.00 plus costs without any request for such amount from PSL and without taking any testimony or reviewing any documentation as to the actual amounts incurred. Prior to concluding the hearing, the lower court made clear on the record that its comments on the record in this case regarding the merger doctrine should be considered "dictum" because that issue was not before it and it "[didn't] need to hear anything about

it.” [Trial Transcript Jan. 24, 2012, p. 12, line 14 thru p. 18, line 10] At the conclusion of the hearing, the lower court requested that Moorhead propose an order and share same with the Bank.

Over the Bank’s objection, the lower court subsequently signed the ‘Final Order and Judgment’ (“Moorhead Order”) exactly in the form proposed by Moorhead. [Moorhad Order] The Moorhead Order was signed and filed on June 7, 2012. The Bank received the Order on June 13, 2012.³

In the Moorhead Order, the lower court awarded Moorhead a personal, money judgment against the Bank under Moorhead’s Mechanic’s Lien Foreclosure claim in the amount of \$132,654.17. [Moorhead Order, p. 9] This amount is representative of the \$32,985.81 ‘retainage’ amount, plus the \$33,642.00 ‘lost bond premium’ amount, plus \$26,234.70 in pre-judgment interest, \$39,000.00 in attorneys’ fees, and \$791.66 in costs. [Moorhead Order, pp. 7-9] Also in the Moorhead Order, the lower court awarded the foreclosure of Moorhead’s Mechanic’s Lien finding the total lien amount to be the same \$132,654.17. [Moorhead Order, p. 9] The lower court did not award Moorhead any damages for either its Breach of Contract claim or its Unjust Enrichment claim against any party. [Moorhead Order]

The lower court also ruled that despite one of the liened properties being previously deeded in lieu of foreclosure to the Bank, the deed to the Bank was *junior* in priority to the subsequently filed Moorhead Mechanic’s Lien. [Moorhead Order, pp. 4-6] The lower court also ruled in its order that the doctrine of merger applied when the Deed in Lieu of Foreclosure was filed such that the August 2005, unsatisfied mortgage

³ The lower court signed separate orders for each of the other two separate lawsuits that were tried together with Moorhead’s.

from PSL to the Bank on the same property should be deemed satisfied. [**Moorhead Order, pp. 4-6**] In so ruling, the lower court concluded that Moorhead's April 2007 Mechanic's Lien was superior in priority to the Bank's August 2005 Mortgage on, and March 2007 Deed to, the subject property.

The Bank served its Motion to Reconsider pursuant to Rule 59(e), SCRPC, on June 22, 2012. [**Motion to Reconsider**] At a hearing on August 21, 2012, the lower court immediately denied the Bank's Motion to Reconsider whereby the lower court requested that Moorhead again supply a proposed order to be shared with the Bank. [**Motion to Reconsider Transcript p. 18, line 16 thru p. 19, line 2**] The Bank received the proposed order and immediately objected to the form order and requested a reasoned order. Over the Bank's objection, the lower court signed the proposed order exactly in the form proposed by Moorhead. [**Order on Motion to Reconsider**] On October 5, 2012, the Bank received written notice of entry of the lower court's October 4, 2012 Order denying the Bank's Motion to Reconsider. On October 11, 2012, the Bank filed its Notice of Appeal as to the lower court's June 7, 2012 Order and as to the lower court's October 4, 2012 Order.

STATEMENT OF FACTS

The underlying lawsuit centers on Respondent Moorhead's alleged construction work on a failed mixed-use development project known as Pendleton Station, located in the Town of Pendleton within Anderson County, South Carolina. [**Maddox Order, p. 3**] The developer of the Pendleton Station project was Defendant PSL. The primary owners and operators of PSL are the family of (former Defendant) Benjamin L. Daniel, Sr. out of Charleston, South Carolina.

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

In August 2005, the Appellant Bank entered into a development loan agreement with PSL. **[Maddox Order, pp. 3-4]** This loan agreement involved the Bank loaning PSL monies via line-of-credit in the amount of \$3 Million for PSL’s horizontal development (site work) of the Project (the “Development Loan”). **[Trial Transcript Dec. 8, 2011, Def. Ex. 1, tab 3]** In exchange, the Bank received, *inter alia*, a promissory note (the “Promissory Note”) from PSL indicating that the Bank was to receive a first mortgage on the 64 acres comprising the three aforementioned properties where the horizontal development was to take place (Tract A, Tract B, and The 2 Acre Tract). **[Trial Transcript Dec. 8, 2011, Def. Ex. 1, tab 2]**

Respondent Moorhead contracted with PSL to complete “all necessary road grading, storm sewer systems, potable water systems, sanitary sewer systems, and all other general grading” on the Project. **[Trial Transcript Dec. 8, 2011, Plaint. Ex. 4]** Moorhead, in-turn, entered into subcontracts with Miller and Craft to perform portions of

this work on the Project. [Trial Transcript Dec. 8, 2011, p. 60, lines 7-12]. The Development Loan money was to be used by PSL to pay for, *inter alia*, the construction completed by Moorhead under Moorhead's contract with PSL. [Trial Transcript Dec. 8, 2011, Def. Ex. 1, tabs 2-3; Bank's Memo in Support of SJ, pp. 2-4]

After the Bank entered into the Development Loan agreement with PSL and while the horizontal construction was underway, the Bank in the fall of 2005 began entering into (vertical) construction loan agreements with individual fee simple owners of the fifty-eight townhome units that were to be constructed as part of the Project (the "Construction Loans"). [Bank's Memo in Support of SJ, pp. 2-4] This vertical construction did not commence until January 2006.

In December 2005, while Moorhead's work on the horizontal construction was still underway and prior to the vertical construction beginning, PSL provided the Bank with, *inter alia*, a first mortgage on an additional 38 acre tract ("The 38 Acre Tract") as further security for the Development Loan.⁴ [Maddox Order, p. 4] The Bank then agreed to increase the Development Loan to PSL to \$5.5 Million. [Trial Transcript Dec. 8, 2011, p. 158, lines 6-15; Bank's Memo in Support of SJ, p. 3] In exchange, PSL agreed to, *inter alia*, have the Project completed by January 2007.

In late February 2007, the Bank notified PSL that PSL was in default of its obligations to the Bank under the Development Loan, to include, without limitation, the obligations to complete the Project in a timely manner and to make timely payments to

⁴ The 38 Acre Tract is contiguous to the northern boundaries of both Tract A and Tract B. The (unimproved) 38 Acre Tract was purchased by PSL for its intended use in later phases of the development. However, at no time during the time period at issue did PSL contract with anyone, including Moorhead, to perform any work on The 38 Acre Tract. [Maddox Order, pp. 5-6] And, no work was ever completed by anyone on The 38 Acre Tract during the time period at issue. [Id.]

the Bank. [Trial Transcript Dec. 8, 2011, p. 158, lines 6-15, Def. Ex. 1, tab 5] At the time, the \$5.5 Million Development Loan was outstanding in full. After PSL failed in its attempts to negotiate an agreement with the Bank to have PSL relieved from any liability to the Bank on the Development Loan, including any deficiency representative of the outstanding debt minus the value of the property that PSL was attempting to deed in lieu of foreclosure, PSL deeded the Project to the Bank in lieu of foreclosure on March 5, 2007 (the "Deed in Lieu"). [Trial Transcript Dec. 8, 2011, Def. Ex. 1, tab 6] The Deed in Lieu transferred only Tract A and The 38 Acre Tract less the units previously sold to the individual unit owners in fee simple.

Prior to deeding the Project to the Bank, PSL agreed to provide the Bank with a title insurance policy for the property deeded in lieu of foreclosure. [Trial Transcript Dec. 8, 2011, Plaintiff Ex.'s 3, 12] Along with a copy of the filed Deed in Lieu, PSL's attorney delivered to the Bank what the attorney represented to the Bank as being a title insurance policy for the property deeded. [Trial Transcript Dec. 8, 2011, p. 173, line 23 thru p 174, line 8; p. 176, lines 3-13]

Upon the Bank's receipt of the Deed in Lieu, the Construction Loan agreements were still in place between the Bank and the fee simple owners of the 58 townhome units. [Trial Transcript Dec. 8, 2011, p. 163, line 21 thru p. 164, line 13] So, the Bank undertook an intensive investigation as to, *inter alia*, the condition and value of the work completed by PSL on the vertical construction and as to the status of PSL's obligations to the individual unit owners. [Trial Transcript Dec. 8, 2011, p. 160, lines 4-11] In an effort to expedite this process and to obtain the information it needed to make the most

informed decisions, the Bank decided to hire Charlie Kernaghan.⁵ [Trial Transcript Dec. 8, 2011, p. 15, lines 1-23]

As soon as the Bank started its investigation with the help of Kernaghan, the Bank learned that several contractors were owed money for the work they performed on the vertical construction. [Trial Transcript Dec. 8, 2011, p. 32, lines 15-22] Despite questions regarding liability for these debts, the Bank immediately paid these contractors out of good faith in an effort to avoid liens/lawsuits being filed against each of the 58 units/unit-owners. Over the course of the following weeks as a clearer picture started to emerge regarding PSL's use, or alleged misuse, of the loan proceeds, more and more questions arose regarding a number of material representations, or alleged misrepresentations, that PSL and its affiliates had made to the Bank, the individual unit-owners, the Town of Pendleton, and others. [Trial Transcript Dec. 8, 2011, p. 160, line 4 thru p. 161, line 11]

Through its investigation during the weeks following the Deed in Lieu, the Bank discovered that PSL and PSL's attorney had not mortgaged The 2 Acre Tract or Tract B to the Bank as agreed in, among other things, the Promissory Note. [Trial Transcript Dec. 8, 2011, p. 171, line 16 thru p. 173, line 2] The Bank also learned that the title insurance policy that PSL and PSL's attorney had delivered to the Bank with the Deed in Lieu was bogus, as the premium had never been paid, which was important to the Bank

⁵ Kernaghan was a former employee of PSL who was working on the Project for PSL (as the latest construction manager for PSL) up until the Deed in Lieu was filed. [Trial Transcript Dec. 8, 2011, p. 14, lines 1-25] The Bank hired Kernaghan because it was undisputed then, and remains so today, that Kernaghan was never involved with the ownership or operation of PSL, was not a member of the much maligned Daniel family (owners of PSL), was never under suspicion for the myriad of claims pending against the Daniels, and he knew a great deal about the actual status of construction on the Project. [Trial Transcript Dec. 8, 2011, p. 15, lines 20-23] It was also beneficial to the Bank that Kernaghan could remain on-site on a daily basis since he lived nearby.

given the fact that the Bank had also just been served during this time with Moorhead's Mechanic's Lien. **[Trial Transcript Dec. 8, 2011, p. 176, lines 7-13]** Also during this time, the Bank began to uncover the magnitude of PSL's misappropriation of Development Loan funds and Construction Loan funds. **[Trial Transcript Dec. 8, 2011, p. 160, line 4 thru p. 161, line 11]** At this same time, it became clear to the Bank that PSL could not obtain the alternative financing that it had promised the Bank it would obtain in order to pay the remaining debt it owed the Bank. **[Trial Transcript Dec. 8, 2011, p. 162, lines 12-15]** So, on May 11, 2007, the Bank filed suit against PSL and its related individuals and entities (the "Bank Lawsuit"). **[Bank Lawsuit, p. 1]**

The Bank Lawsuit included claims against PSL and its principals for, among a litany of other claims, the deficiency still owing on the Development Loan. **[Bank Lawsuit, pp. 16-17; 18-19]** The Bank Lawsuit also alleged that PSL failed to mortgage Tract B and The 2 Acre Tract as security for the Development Loan in accordance with the terms of the Promissory Note.⁶ **[Bank Lawsuit, pp. 45-47]** As soon as PSL filed its Answer to the Bank Lawsuit in July 2007, PSL quitclaimed The 2 Acre Tract to the Bank ("Quitclaim Deed") pursuant to the understanding (outlined below) between PSL and the Bank regarding a credit against the still outstanding deficiency. **[Quitclaim Deed]**

The Bank never satisfied the August 2005 Mortgage to the Bank from PSL, which was filed against Tract A and The 38 Acre Tract to secure the Development Loan.

After lengthy negotiations, the Bank was deeded each of the 58 individual units, mostly in lieu of foreclosure. **[Trial Transcript Dec. 8, 2011, p. 163, line 21 thru p. 164, line 18]** After separate, lengthy negotiations with Zellner, Zellner deeded Tract B to

⁶ The Bank Lawsuit was one of at least fourteen (14) different lawsuits filed in conjunction with this failed development.

the Bank ("Zellner Deed") in February 2008. **[Zellner Deed]** In late August 2007, the Bank hired another contractor after it made the decision to complete the Project in hopes of recouping some of its damages.⁷ **[Trial Transcript Dec. 8, 2011, p. 162, lines 16 thru p. 163, line 4]**

On August 31, 2007, Moorhead filed the underlying lawsuit. **[Compl.]**

ARGUMENT

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

According to the lower court's Moorhead Order, the only cause of action upon which Moorhead prevailed (against any Defendant) was its mechanic's lien foreclosure claim. **[Moorhead Order]** However, in the lower court's Order, the lower court appears to have entered a personal judgment against the Bank in the amount of \$132,654.17. **[Moorhead Order, p. 9]**

A mechanic's lien foreclosure claim is not *in personam*; therefore, there is no basis in law for a personal judgment to have been entered against the Bank. Ad. Coast Lumber Corp. v. Morrison, 152 S.C. 305, 309-10, 149 S.E. 243, 245 (1929)("[I]n a proceeding strictly to enforce a mechanic's lien, the petitioner may not recover a personal judgment against the owner of the property or such judgment for any deficiency that may result from its sale.").⁸ Mechanic's liens are purely of statutory origin, and can be acquired and enforced only in accordance with the strict terms and conditions of the specific statute creating them. Williams v. Vanvolkenburg, 312 S.C.

⁷ Unfortunately, this decision came just before the real estate collapse of late 2007, which- together with Moorhead's *lis pendens* being of record for close to six (6) years now preventing the Bank from selling the finished Project for market value - has led to further losses to the Bank.

⁸ See also Smythe v. Monash, 109 S.C. 82, 85, 95 S.E. 138, 139 (1918); See also Metz v. Critcher, 83 S.C. 396, 65 S.E. 394 (1909); See also Tenny v. Anderson Water, Light & Power Co., 67 S.C. 11, 45 S.E. 111 (1903).

373, 440 S.E.2d 408 (Ct. App. 1994). While a party asserting a mechanic's lien is not precluded from seeking damages for breach of contract in conjunction with, or as an alternative to the mechanic's lien, a statutory mechanic's lien action should not be confused with, and is not a vehicle for, the collection of damages for breach of contract. Sea Pines Co. v. Kiawah Island Co., 268 S.C. 153, 232 S.E.2d 501 (1977). Mechanic's lien protection does not extend to those persons who are not within the protected class identified in the statutes. Guignard Brick Works v. Gantt, 251 S.C. 29, 159 S.E.2d 850 (1968).

Moorhead, itself, made clear in the only testimony provided on its behalf that there are only "two separate actions for damages that [Moorhead has] ... one is for the mechanic's lien issue against the Bank but [Moorhead] also [has] a breach of contract claim against Pendleton Station, LLC." [Trial Transcript Dec. 8, 2011, p. 64, lines 14-19] Mr. Moorhead also testified that he agreed that the Bank doesn't owe Moorhead any money on the contract because Moorhead never had a contract with the Bank. [Trial Transcript Dec. 8, 2011, p. 68, lines 12-15]

Therefore, in accordance with the plain language and meaning of the relevant statutory scheme, the lower court's personal judgment against the Bank was in error and should be reversed.

II. DID THE LOWER COURT PROPERLY FIND A PARTY LIABLE FOR ANY UNDERLYING DEBT OWED TO RESPONDENT UNDER RESPONDENT'S MECHANIC'S LIEN CLAIM?

Moorhead's Mechanic's Lien was filed under S.C. Code Ann. § 29-5-10(a), which provides in pertinent part:

A person to whom a *debt is due* for labor performed or furnished or for materials furnished and actually used in the erection, alteration, or repair

of a building or structure upon real estate ... shall have a lien upon the building or structure ... to secure the payment of the debt due to him.

S.C. Code Ann. § 29-5-10(a) (*emphasis added*).

A mechanic's lien exists only by virtue of statute; therefore, one's right to a mechanic's lien is wholly dependent upon the language of the statute creating it. Skiba v. Gessner, *Id.*; 374 S.C. 208, 648 S.E.2d 605 (2007); 22 S.C. Jur. Mechanics' Liens § 4 (2012). Perhaps the most fundamental aspect of all mechanic's lien law is the existence of an outstanding debt owing to the lienor. *Id.* This State's mechanic's lien law is no different. *Id.* This principle could not be made any clearer than in the opinion rendered by the South Carolina Court of Appeals in the case of Glidden Coatings & Resins, Div. of SCM Corp. v. Suitt Construction Co., Inc., 290 S.C. 240, 349 S.E.2d 89 (1986):

The predicate for recovery in any [mechanic's lien foreclosure] suit[] is the existence of an unpaid debt. This is abundantly clear from a reading of the mechanic's lien statute, which states in pertinent part:

Any person to whom a debt is due for labor performed or
furnished or for materials furnished ... shall have a lien ...
to secure the payment of the debt so due to him...

Section 29-5-10, Code of Laws of South Carolina, 1976. As we have had occasion to observe in another context, a valid security interest cannot exist without a valid underlying debt. See Blackwell v. Powell, 346 S.E.2d 731 (S.C.Ct.App. 1986)(mortgage).

Glidden Coatings & Resins, Div. of SCM Corp. v. Suitt Construction Co., Inc., 290 S.C. 240, 244, 349 S.E.2d 89, 91-92 (1986). Therefore, in order for any court of this State to find Moorhead's Mechanic's Lien proper, it must first find, in accordance with the plain language of the statute, that a valid unpaid debt is due Moorhead. *Id.*

In this case, the only determination the lower court made that can possibly be construed as a finding of a debt due Moorhead is the personal judgment entered against the Bank in conjunction with Moorhead's mechanic's lien foreclosure claim. As

discussed *supra*, this finding was clearly in error. The lower court found no party liable under Moorhead's Breach of Contract claim or Unjust Enrichment claim⁹, so the lower court has failed to properly find that a debt is otherwise due Moorhead from anyone. Thus, Moorhead's lien claim must fail based on this most basic aspect of our mechanic's lien law; the lower court's order to the contrary was in error and should be reversed.

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

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

First, in accordance with the following unequivocal directives found in S.C. Code Ann. § 29-5-10, in order for the work performed by Moorhead on March 6, 2007 to be 'lienable', it had to have been provided pursuant to either an agreement with or by the consent of the owners of each tract:

A person to whom a debt is due for labor performed or furnished or for materials furnished and actually used in the erection, alteration, or repair of a building or structure upon real estate ... *by virtue of an agreement with, or by consent of, the owner of the building or structure, or a person having authority from, or rightfully acting for, the owner in procuring or furnishing the labor or materials* shall have a lien upon the building or structure and upon the interest of the owner of the building or structure in the lot of land upon which it is situated to secure the payment of the debt due to him. ...

⁹ Moorhead testified that it was not seeking damages under its Unjust Enrichment claim; it was only seeking damages on its Breach of Contract claim against PSL and for its Mechanic's Lien "against the Bank". [Trial Transcript Dec. 8, 2011, p. 64, lines 14-19]

S.C. Code Ann. § 29-5-10(emphasis supplied). Analyzing this portion of Section 29-5-10, this State's Supreme Court in the case of Gray v. Walker, 16 S.C. 143, 146 (1881), held: "Consent, here, we think implies something more than a mere acquiescence in a state of things already in existence. It implies an agreement to that which, but for the consent, could not exist, and which the party consenting has the right to forbid." Id. at 147; Guignard Brick Works v. Gantt, 251 S.C. 29, 159 S.E.2d 850 (1968). Consent under this Code Section means an agreement of legal force. Geddes v Bowden, 19 SC 1 (1883).

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

In order to perfect and enforce a mechanic's lien, the person asserting the lien (1) must serve upon the owner or person in possession and file with the register of deeds or clerk of court a notice or certificate of lien containing the lien amount, a description of the real property, and other required information 'within ninety days after he ceases to labor on or furnish labor or materials for such building or structure'¹⁰; (2) must commence a lawsuit seeking to enforce the lien within six months after ceasing to provide labor or materials for such real property¹¹; and (3) must file a notice of the pending action (lis pendens) within six months after ceasing to provide labor or materials for such real property.

Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 129, 631 S.E.2d 252, 256 (2006). "If these steps are taken, the person claiming the lien may foreclose against the property to satisfy the debt. On the other hand, if he fails to take any one of these steps,

¹⁰ Section 29-5-90, mandating service and filing of a certificate of lien, provides in pertinent part: Such a lien shall be dissolved unless the person desiring to avail himself thereof, *within ninety days after he ceases to labor on or furnish labor or materials for such building or structure*, serves upon the owner ... a statement of a just and true account of the amount *due him*, with all just credits given ... which certificate ... shall be recorded in a book kept for the purpose by the register or clerk...

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

¹¹ Section 29-5-120 contains the limitations period for commencing suit to foreclose a mechanic's lien. This statute reads:

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

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

the lien against the property is dissolved pursuant to Sections 29-5-90 and 25-9-120.”
Id.

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

In order to prevent lien claimants in this State from improperly manufacturing their last date of work for purposes of trying to revive their otherwise expired lien rights, the courts of this State have delineated a threshold for the level of services performed and the level of materials furnished on the date when cessation of labor is alleged by the lien claimant. Butler Contracting, supra; Wood v. Hardy, 235 S.C. 131, 110 S.E.2d 157 (1959). The South Carolina Supreme Court has ruled that when an unreasonable period of time has elapsed since substantial completion of the work, the performance of trivial services or the furnishing of trivial materials generally will not extend the time for filing the certificate past the date of substantial completion. Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 131, 631 S.E.2d 252, 257-58 (2006). If, however, subsequent to the date of substantial completion, trivial services or materials are provided at the request of the owner, rather than at the initiative of the contractor for the purpose of

saving a lien, the furnishing of such work or material will extend the commencement of the period for filing a certificate of mechanic's lien. Id.

“Where a claimant, after a contract is substantially completed, does additional work or furnishes additional material which is necessary for the proper performance of his contract, and which is done in good faith at the request of the owner or for the purpose of fully completing the contract, and *not merely as a gratuity* or act of friendly accommodation, the period for filing the lien will run from the doing of such work or the furnishing of such materials, irrespective of the value thereof.” Wood v. Hardy, 235 S.C. 131, 140, 110 S.E.2d 157, 161 (1959)(emphasis added); see also Butler Contracting at 130-131, 631 S.E.2d at 257. The time for filing a mechanic's lien begins to run from the time the last item of the account is furnished, *when the entire account is a continuous and a connected transaction*. Wood at 139, 110 S.E.2d at 160-61(emphasis supplied).

In some cases, the last material furnished or last work performed on a job may satisfy the ‘last date of work’ statutory analysis even if such material or work is insignificant or delayed. Butler Contracting at 131-132, 631 S.E.2d at 257-258. However, the reason for the delay shall not be to improperly extend the period of perfecting the lien, and the work performed or materials furnished must be *considered by the parties to the contract to be necessary* for compliance with the contract and to fulfill the duty of good faith and fair dealing which is an implied term of every contract. Id.(emphasis added) But, the implied duty of good faith and fair dealing is not recognized absent proof of a *still valid, underlying contract*. Dodgens v. Kent Mfg. Co., 955 F. Supp. 560, 21 A.D.D. 192 (D.S.C. 1997) (applying South Carolina law)(emphasis added); 30 S.C. Jur. Contracts § 47. Moreover, the implied duty of good faith and fair dealing *does not extend*

to one that is not a party to the underlying contract. Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co., 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003)(emphasis added).

Prior to getting into the mechanics of Sections 29-5-90 and 29-5-120, a determination must first be made regarding the consent of the owners under Section 29-5-10 to the alleged work of Moorhead. Based on Moorhead's testimony, Moorhead did not get the consent of Enterprise Bank to do the work on March 6, 2007 on Tract A, as Moorhead did not even know who the Bank was at that time. **[Trial Transcript Dec. 8, 2011, p. 67, line 25 thru p. 68, line 15; p. 70, lines 7-18; p. 84, line 22 thru p. 85, line 5; p. 85, lines 16-21; p. 86, lines 4-6]** Likewise, Moorhead had not entered into any agreement with the Bank to do the work. **[Id.]** Further still, Moorhead did not get the consent of, or enter into an agreement with, Zellner to do any work on Tract B or with PSL to do any work at that time on The 2 Acre Tract. **[Id.]** In fact, as outlined below, Moorhead testified that it had agreed with PSL in February 2007 that it would *not* do any more work on the Project, and *not* be responsible for doing any more work on the Project- including, specifically, the "erosion control" work that Moorhead claims it then did on March 6, 2007. **[Trial Transcript Dec. 8, 2011, p. 71, line 2 thru p. 77, line 5]**

Ignoring the fundamental failure of Moorhead to obtain the consent of the owners for the March 6, 2007 work (and the lethal effect of same to Moorhead's lien claim), all credible evidence in this case establishes that the lien filed by Moorhead and the associated foreclosure suit filed by Moorhead were not timely in accordance with Sections 29-5-90 and 29-5-120. Moorhead filed its Mechanic's Lien on April 17, 2007 wherein Moorhead alleged that its last date of work on the Project occurred on March 6,

2007. Moorhead filed the underlying lawsuit to foreclose its lien on August 31, 2007. The lower court found that Moorhead's last date of work on the Project was on March 6, 2007 and that the filing of Moorhead's Lien and foreclosure complaint were, thus, timely. **[Moorhead Order, p. 6]** However, the only credible evidence presented at trial proves that the last date that Moorhead performed labor sufficient to satisfy the standards of S.C. Code Ann. § 29-5-10, *et seq.* was October 25, 2006 - making both the lien and foreclosure suit untimely.¹²

Kevin Moorhead was the only witness that testified at trial on behalf of Moorhead. The only evidence of substance noted by the lower court in its order regarding the issue of whether Moorhead's lien was timely was Kevin Moorhead's testimony. **[Moorhead Order, p. 3]** While the lower court also referenced the testimony of two non-parties concerning their general impression of Kevin Moorhead's trustworthiness, the lower court provided only the following findings of fact regarding the timeliness of Moorhead's lien:

He testified that his last date performing work on the real property was on March 6, 2007. He specifically recalled this date because he and Miller (his subcontractor) were called by DHEC to come to the job site in order to fix a detention pond and silt fence that was failing and casting water into a protected wetlands area. This type of corrective work [erosion control] is contemplated and called for in his contract.

...

I also find that there was *no testimony presented* that would refute Kevin Moorhead's testimony as to when Moorhead's last date of work was on the project.

[Moorhead Order, p.3(emphasis supplied)]. The problem, however, is that none of the above findings of fact are supported by the credible evidence in the record. The simple fact is that this is not what Kevin Moorhead ultimately testified to at trial.

¹² It is undisputed in this case that the last date Moorhead performed work on site prior to its alleged March 6, 2007 date was months earlier in October 2006.

First and foremost, the referenced “contract” between Moorhead and PSL (entered into evidence by Moorhead) makes no mention whatsoever of “erosion control”. **[Trial Transcript Dec. 8, 2011, Plaint. Ex. 4]** In addition, while Mr. Moorhead first attempted to claim (under oath) that he recalled being on-site on that March 6, 2007 date, he actually conceded that he, in fact, did not know if he was on-site on March 6, 2007. **[Trial Transcript Dec. 8, 2011, p. 84, lines 15-21]** And, while Mr. Moorhead first attempted to claim (under oath) that he recalled being on-site that day to perform erosion control under only a fear of DHEC reprisal, he later testified that “I don’t recall the reason we went” to the Project on the March 6, 2007 date he claimed was his last date of work. **[Trial Transcript Dec. 8, 2011, p. 86, lines 4-6]**

Further, there was absolutely no evidence produced at trial, including any testimony by anyone, claiming DHEC called or otherwise demanded anyone to come to the Project site. The only relevant testimony provided on this issue was the mere (alleged) fear of DHEC reprisal if the work was not done. **[Trial Transcript Dec. 8, 2011, p. 74, lines 1-8; p. 85, lines 8-9; p. 82, line 25 thru p. 83, line 23]** Mr. Moorhead never testified that he or Miller were called or otherwise instructed by DHEC (or anyone) to come to the job site to do any work on that alleged date, much less “to fix a detention pond and silt fence that was failing and casting water into a protected wetlands area”, as the lower court ‘found’. **[Id.; Moorhead Order, p. 3]** Further still, Mr. Moorhead also testified that neither he nor his subcontractors were on any stormwater permit with DHEC. **[Trial Transcript Dec. 8, 2011, p. 74, lines 1-10]** Based on this fundamental premise, together with the undisputed fact that neither Moorhead nor any of his subs were in either financial or operational control of the site at any time (especially on March 6,

2007), DHEC would have had no authority over Moorhead or its subs in this instance anyway.

Contrary to the astonishing ‘finding’ of the lower court that “*no testimony was presented* that would refute Kevin Moorhead’s testimony as to when Moorhead’s last date of work was on the project”, extensive testimony and significant evidence was presented that absolutely refutes Mr. Moorhead’s testimony regarding his alleged March 6, 2007 last date of work. [**Moorhead Order, p. 4(emphasis supplied)**].¹³ Strikingly, the most compelling of this evidence came in the form of documents generated by, on behalf of or for the benefit of Moorhead and via testimony provided by Moorhead. This compelling testimony and evidence makes it clear that Moorhead’s statutory last date of work was October 25, 2006.

Moorhead submitted its last Pay Application for its work on the Project on November 13, 2006. [**Trial Transcript Dec. 8, 2011, p. 80, lines 1-13**] This Pay Application #15 was a request for payment from PSL for work that Moorhead claimed it had done on the Project “thru 10-25-06”. [**Id.; Trial Transcript Dec. 8, 2011, p. 79, line 3 thru p. 80, line 19; Def. Ex. 14**] Even though the Project was not complete as of the October 25, 2006 date, Moorhead did not submit another Pay Application for its work on the Project. [**Id.**] Reason being, Moorhead became embroiled in a dispute with PSL regarding change order work at this time, which led to Moorhead pulling off the Project during this October 2006 timeframe. [**Trial Transcript Dec. 8, 2011, p. 71, line 2 thru p. 77, line 5**]

¹³ Charlie Kernaghan testified to driving by the project site at least twice each day after March 5, 2007 until a fence was installed a week or two later, and that he never saw anyone working on-site performing any erosion control during this time frame. [**Trial Transcript Dec. 8, 2011, p. 181, lines 9-12; p. 186, line 19 thru p. 187, line 9**]

In January 2007, after Moorhead waited for two months for PSL to provide Moorhead with what Moorhead described “critical to performance” information, Moorhead exchanged written correspondence with PSL in an effort to resolve the outstanding issues. **[Trial Transcript Dec. 8, 2011, p. 72, line 3 thru p. 73, line 2]** However, the issue did not get resolved and so Moorhead hired an attorney in January 2007 to negotiate a formal mutual termination of the contract between Moorhead and PSL. **[Trial Transcript Dec. 8, 2011, p. 73, lines 3-14]** On February 6, 2007, while PSL and Moorhead were negotiating the formal mutual termination of their contract, Dunn & Associates, Inc. (the engineer certifying pay applications on behalf of PSL for the horizontal construction of the Project) wrote Moorhead a letter confirming that Moorhead was still not performing any work on the Project. **[Trial Transcript Dec. 8, 2011, p. 73, line 15 thru p. 74, line 22]** A few days later, on February 9, 2007, Moorhead’s attorney exchanged correspondence with PSL’s attorney wherein Moorhead’s attorney again confirmed the history of events up to that date, including the fact that Moorhead had not worked on-site since October 25, 2006. **[Trial Transcript Dec. 8, 2011, p. 74, line 23 thru p. 77, line 5]**

In the February 9, 2007 letter, Moorhead’s attorney explained that Moorhead was last on-site on that October 2006 day for a meeting with Dunn, SCDOT and a grading contractor for the purpose of Dunn or PSL to provide Moorhead with the information needed to resolve the outstanding “critical-to-performance” issues on the Project. **[Id.]** Moorhead’s attorney confirmed that Moorhead was still waiting on February 9, 2007 for that “critical-to-performance” information to be provided before it would even consider resuming its work on the Project. **[Id.]** Notably, the letter also made abundantly clear

Moorhead's understanding that on that October 2006 date: "[t]he Owner took full control and responsibility for the entire site, and the Owner remains in control of, and responsible for the entire site, including but not limited to stabilization and erosion control, today." **[Id.(emphasis supplied)]** The letter from Moorhead's attorney to PSL concluded by explaining to PSL what must occur before Moorhead would consider returning to work on the Project. **[Id.]**

On February 16, 2007, after Moorhead entered into an agreement with PSL that terminated their contract¹⁴, Moorhead confirmed with its subcontractors, Miller and Craft, that Moorhead's "contract with Pendleton Station has been mutually dissolved" **[Trial Transcript Dec. 8, 2011, p. 80, line 1 thru p. 81, line 16; p. 82, lines 2-10; Plaint. Ex. 1, tab 20]** Moorhead instructed Miller and Craft to "[p]lease cease any and all work being done on this project."¹⁵ **[Id.]** Moorhead confirmed in its testimony at trial that it was done with work on the Project at that time and was not going back to work on the Project. **[Id.]** Moorhead also testified at trial that it did not make any request for payment to anyone after November 2006. **[Trial Transcript Dec. 8, 2011, p. 80, lines 1-13]** In entering an agreement in February 2007 with PSL for the mutual termination of its contract to perform work on the Project, Moorhead made it abundantly clear that it had completed furnishing work under its contract with PSL and that Moorhead was turning over any and all responsibility it may have had on any aspect of the Project to PSL - including, notably, erosion control. So, pursuant to Moorhead's own representation in February 2007, there is no question that it had substantially completed its work on the

¹⁴ Moorhead claimed in his testimony at trial that PSL never followed through with their termination agreement; however, Moorhead never made a claim against PSL on this issue. **[Compl.]**

¹⁵ During this time frame, and as more fully discussed herein below, the Bank was completely unaware of these issues.

Project when it last performed work on the Project in October of 2006, and that the ‘erosion control’ work Moorhead alleged to have performed on March 6, 2007 was the first work it had done on the Project since October 2006.

In accordance with the Butler Contracting case, there being no question that Moorhead had substantially completed its work on the Project some five months before March 6, 2007, an analysis must then be made regarding the type of work alleged to have been performed by Moorhead on March 6, 2007 to determine: (1) whether it was gratuitous; and (2) whether it was at the request of the owner. Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 131, 631 S.E.2d 252, 257-58 (2006). Strikingly, Mr. Moorhead testified in unambiguous terms that this March 6, 2007 work was, in fact, “gratuitous” and that Moorhead was not instructed by anyone – the Bank, Zellner, PSL (owners of the properties where the work allegedly took place), or anyone else – to do the alleged work. [Trial Transcript Dec. 8, 2011, p. 84, line 15 thru p. 85, line 5; p. 86, lines 3-6; p. 67, line 25 thru p. 68, line 15] Moorhead testified that it did not expect to get paid for the work, that it did not bill for any work on the Project after October 2006, and that the only money it was owed was for work it performed before its November 2006 Pay Application. [Trial Transcript Dec. 8, 2011, p. 80, lines 1-13, p. 83, lines 9-23]

Further still, Moorhead’s testimony confirms that the work performed could in no way be considered furnished as the last item of the contract. Likewise, Moorhead’s testimony confirms that the alleged last work was not a part of a continuous contract such that the alleged work could otherwise be considered a connected transaction. Wood at 139, 160-61.

It is clear in this case that Moorhead is claiming a lien under the narrow grounds that the work it alleges it performed on March 6, 2007 was considered by the parties to the contract to be necessary for compliance with the contract and to fulfill the duty of good faith and fair dealing which is an implied term of every contract. However, notwithstanding the myriad of other issues with Moorhead's position, the implied duty of good faith and fair dealing is not recognized absent proof of a *still valid, underlying contract*. Dodgens v. Kent Mfg. Co., 955 F. Supp. 560, 21 A.D.D. 192 (D.S.C. 1997) (applying South Carolina law)(emphasis added); 30 S.C. Jur. Contracts § 47. And, in this case, the evidence reveals that any such contract was mutually terminated long before the alleged work took place. [**Trial Transcript Dec. 8, 2011, p. 80, line 1 thru p. 81, line 16; Def. Ex. 1, tab 20**] Moreover, the implied duty of good faith and fair dealing owed in the contract between PSL and Moorhead before it was terminated does not extend to parties such as Enterprise Bank and Zellner who were never parties to that underlying contract. Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co., 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003).

The contract here, as Moorhead testified, was mutually terminated long before this alleged last date of work. The contract was not only terminated, Moorhead testified in no uncertain terms that representations were made on Moorhead's behalf at that time that made clear that Moorhead no longer maintained any responsibility whatsoever of the Project, including any responsibility for the erosion control work that it allegedly returned "gratuitously" without request of the owner to perform. Wood v. Hardy, 235 S.C. 131, 140, 110 S.E.2d 157, 161 (1959); see also Butler Contracting at 130-131, 631 S.E.2d at 257.

The undisputed facts of this matter make it clear that the level of services allegedly performed by Moorhead on March 6, 2007 do not pass the threshold established by the courts of this State to qualify the same as the lienor's 'last date of work' for purposes of satisfying the statutory requirements of S.C. Code Ann. §§ 29-5-90 and 29-5-120. The 'work' alleged to have been completed by Moorhead was by Moorhead's own admission(!) "gratuitous". The courts of this State have made clear that the performance of such gratuitous services will not extend the time for filing the certificate past the date of substantial completion. Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 131, 631 S.E.2d 252, 257-58 (2006). Even if Moorhead actually did the "gratuitous" 'work' it alleges, an unreasonable period of time elapsed since substantial completion of the work. And, the work was not provided at the request of the owner. Rather, based on the undisputed facts, it is abundantly clear that the alleged work was done at the initiative of Moorhead for the sole purpose of trying to revive its otherwise long expired lien rights. The courts of this State have declared that the furnishing of such work will not extend the commencement of the period for filing a certificate of mechanic's lien. Id.

Likewise, Moorhead's position is further eroded due to the fact that Moorhead did not perform the alleged work by virtue of an agreement with or by the consent of any of the owners personally or through someone having authority to rightfully act for any of the owners- a fundamental basis for any such lien claim. S.C. Code Ann. § 29-5-10.

In light of the above, the lower court's determination that Moorhead's statutory last date of work was March 6, 2007 was in error. Thus, the lower court's determination that Moorhead's mechanic's lien and foreclosure suit were both filed in a timely manner (in accordance with S.C. Code Ann. §§ 29-5-90 and 29-5-120) was also in error and

should be reversed.

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

It has been established by the courts of this State that an owner's liability under the mechanic's lien statutes is limited to the balance due by the owner to the prime contractor at the time the owner received notice of the claim. Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 629-630, 93 S.E.2d 855, 860 (1956); Wood v. Hardy, 235 S.C. 131, 138, 110 S.E.2d 157, 160 (1959). This is the case because one of the main purposes of this State's statutory mechanic's lien scheme is "the protection of the owner by preventing his liability on the liens from exceeding the amount owner owes on the contract price." Lowndes Hill Realty at 629, 93 S.E.2d at 860; Taylor Cotton and Ridley Inc. v. Okatie Hotel Group, LLC, 372 S.C. 89, 96, 641 S.E.2d 459, 462 (2007). This is evidenced by the plain and ordinary meaning of the relevant statutes, S.C. Code Ann. §§ 29-5-10¹⁶, 29-5-20¹⁷, 29-5-40¹⁸, *et seq.* Taylor Cotton and Ridley at 96-97, 641 S.E.2d at 463.

Again, a mechanics' lien exists only by virtue of statute; therefore, one's right to a mechanics' lien is wholly dependent upon the language of the statute creating it such that the mechanic's lien protection does not extend to those persons who are not within the

¹⁶ S.C. Code Ann. § 29-5-10 provides, in pertinent part: "A person to whom a debt is due ... by virtue of an agreement with, or by consent of, the owner of the building or structure ... shall have a lien upon the building or structure and upon the interest of the owner ... to secure the payment of the debt due to him [by the owner pursuant to such agreement with owner]." *Id.*

¹⁷ S.C. Code Ann. § 29-5-20 provides, in pertinent part: "[I]n no event shall the total aggregate amount of liens on the improvement exceed the amount *due by the owner*." *Id.* (emphasis added).

¹⁸ S.C. Code Ann. § 29-5-40 provides, in pertinent part: "[I]n no event shall the total aggregate amount of liens set up hereby exceed the amount *due by the owner* on the contract price for the improvement made." *Id.* (emphasis added).

protected class identified in the statutes. Skiba v. Gessner, 374 S.C. 208, 212, 648 S.E.2d 605, 606 (2007). In order for the Court to find the Plaintiff's mechanic's lien proper, it must find, in accordance with the plain language of the statute, that a debt is due the Plaintiff, and that debt is due *by the owner* of the lien property.

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

In the case at hand, it is undisputed that Moorhead filed its lien on April 17, 2007 for work it alleged it provided under the contract it had with PSL. It is also undisputed that the Bank became owner of Tract A on March 5, 2007 without notice of Moorhead's claim- the Bank first received notice of Moorhead's claim after March 5, 2007. **[Trial Transcript Dec. 8, 2011, p. 67, line 25 thru p. 68, line 11; Bank's Reply Memo in Support of Motion for SJ pp. 16-19; Affidavit of Kernaghan; Affidavit of Mathias]** Moorhead testified at trial to never notifying the Bank prior to the March 5, 2007 Deed in Lieu of any alleged debt due Moorhead. It is also undisputed that at no time, including the time when Moorhead first notified the Bank of the alleged debt due Moorhead, has the Bank ever owed any money to Moorhead for anything, including the work Moorhead alleges to have completed under its lien. **[Trial Transcript Dec. 8, 2011, p. 64, line 14 thru p. 65, line 6; p. 67, line 25 thru p. 68, line 5]** Thus, Moorhead's Mechanic's Lien fails as a matter of law as against Tract A, and the lower court's ruling to the contrary is in error and should be reversed.

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

PSL was the owner of The 2 Acre Tract at the time Moorhead notified PSL of the amount Moorhead claimed it was due from PSL under its lien. **[Quitclaim Deed]** Due to the relationship between Moorhead and PSL, any amount due by PSL to Moorhead under such a lien claim would have to arise under the contract between Moorhead and PSL. However, the lower court did not rule in Moorhead's favor regarding the amounts Moorhead alleged to be due by PSL under either of Moorhead's breach of contract claim or unjust enrichment claim against PSL (instead, entering a personal judgment against the Bank).¹⁹ **[Moorhead Order]** As detailed herein, PSL deeded The 2 Acre Tract to the Bank after PSL was notified by Moorhead of same (said deed being subject to Moorhead's lien). Therefore, as logic dictates, the Bank's liability (both in rem and in personae, as discussed herein) must also be nil with respect to Moorhead's lien claim against The 2 Acre Tract, resulting in Moorhead's mechanic's lien failing as a matter of law and the lower court's ruling being in error and should be reversed.

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

It is undisputed that Zellner was the owner of Tract B when it was first notified of Moorhead's claim. **[Zellner Deed]** Moorhead voluntarily dismissed Zellner from its

¹⁹ Notably, Moorhead chose not to appeal this decision of the lower court.

lawsuit prior to the underlying trial. At trial, Moorhead put forth no evidence whatsoever regarding any debt owed by Zellner to Moorhead (via agency theory or otherwise), including any debt resulting from any alleged work performed by Moorhead on Tract B. Moreover, as addressed above, the lower court did not rule in Moorhead's favor regarding Moorhead's claim against PSL for the work Moorhead alleged to have completed on Tract B under its contract with PSL.

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

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

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

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

S.C. Code Ann. § 29-5-70. Even Moorhead, in the Mechanic's Lien Foreclosure Cause of Action in its Complaint, seemed to acknowledge this law as Moorhead's claim-specific prayer for relief requested the lower court to foreclose its lien "subject to recorded mortgages." [Compl.] The mortgage of the Bank was filed against Tract A beginning in

August 2005. [Trial Transcript Dec. 8, 2011, Def.'s Ex. 1, tab 2] Moorhead's mechanic's lien was filed against Tract A in mid-2007. Therefore, in light of the unambiguous language found in S.C. Code Ann. § 29-5-70, Moorhead's lien is not enforceable against the Bank's previously filed mortgages on the property known as Tract A. The lower court's ruling to the contrary was in error and should be reversed.

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

With respect to the property known as Tract A, it is the position of the Bank that the recording statute of this State, S.C. Code Ann. § 30-7-10, makes it clear that Moorhead's subsequently filed mechanic's lien cannot be foreclosed against the interests of the Bank based on either the prior mortgage or prior deed filed in favor of Enterprise Bank. S.C. Code Ann. § 30-7-10; The Lite House v. J.C. Roy Co., Inc., 309 S.C. 50, 51, 419 S.E.2d 817, 818 (Ct App. 1992). The courts of this State have established that "a mortgagee is entitled to the advantage of the doctrine of equity of purchaser for a valuable consideration without notice." Norwood v. Norwood, 36 S.C. 331, 15 S.E. 382, 384 (1892); The Lite House, *supra*.

Moorhead testified that prior to March 5, 2007, it never provided notice to the Bank for the alleged amounts due because he had no contract with the Bank and did not know that they were involved on the Project or even who they were. [Trial Transcript Dec. 8, 2011, p. 68, lines 4-15] There is no evidence in the record that the Bank, prior to March 5, 2007 had any notice of the debt Moorhead alleges it is due. The lower court's order discusses the knowledge gained by the Bank after the deed in lieu of foreclosure regarding unpaid contractors ("by virtue of the numerous payments to unpaid contractors

just days after receiving the deed in lieu of foreclosure, Enterprise Bank clearly had notice that there were a number of unpaid contractors on this project”), but, as the record reflects, the Bank had no notice of Moorhead’s claim prior to the deed in lieu of foreclosure. [**Moorhead Order, p. 5 (emphasis added)**]. Moreover, it is inequitable to declare that the Bank paid nothing of value for Tract A when testimony was provided on behalf of Enterprise Bank that it loaned over \$5 Million to PSL for the improvements (including those performed by Moorhead) of the subject property, and was not repaid the outstanding balance of several million dollars. [**Trial Transcript Dec. 8, 2011, p. 44, lines 18-19; p. 166, lines 18-23**]

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

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

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

First, as the record reflects, the doctrine of merger was not at issue in this matter. However, as the record also reflects, the lower court volunteered its opinion regarding the doctrine of merger without any solicitation from the Bank, Moorhead or any other party. [**Trial Transcript Dec. 8, 2011, p. 209, lines 8-20; Trial Transcript Jan. 24, 2012, p. 12, line 6 thru p. 18, line 10; Motion to Reconsider Transcript Aug. 21, 2012, p. 7, line 24 thru p. 9, line 20**] When the lower court attempted to provide additional

unsolicited commentary on this issue at the final hearing, the Bank was compelled to bring to the lower court's attention what all parties otherwise knew – that this narrow issue was being litigated in a separate matter (the Bank Lawsuit) between the Bank and PSL pending in the same circuit before a different judge who had already ruled that the issue was to be heard by a jury in that case.²⁰ In response, the lower court apologetically indicated on the record: “if that’s not before me I don’t need to hear anything about it. [Trial Transcript Jan. 24, 2012, p. 18, lines 3-4] The lower court then further recanted by immediately proclaiming that its statements were “dictum. Consider it dictum”. [Trial Transcript Jan. 24, 2012, p. 18, lines 3-8]

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

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

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

Despite the dictum qualification being clearly provided by the lower court, its Order not only includes a ruling on the issue of merger²¹, it provides a lengthy analysis of what it deems (incorrectly) the controlling law on the doctrine of merger in this State. [Moorhead Order, pp. 5-6, 9-10] The lower court’s order in this regard was in error and should be reversed.

²⁰ Judge Nicholson, before whom the Bank Lawsuit was being litigated at the time, had previously ruled in an order he rendered on a summary judgment motion that the matter was factual and was to be tried before the jury in that case (“Judge Nicholson Order”). [Judge Nicholson Order]

²¹ The record reflects zero evidence that would support a determination that merger applies. In fact, the only evidence submitted at trial that could possibly be construed as evidentiary support for a ruling on merger came via sworn testimony from Enterprise Bank. And, such testimony makes it clear, upon applying the correct law, that merger did not apply here.

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

The lower court's statements on the record making clear that its prior voluntary commentary regarding merger being mere "dictum" together with the context in which the lower court's retraction occurred indicated to the Bank the lower court's acknowledgement of the well established legal principle that one circuit court judge may not reverse or modify the order of another circuit judge. Binkley v. Burry, 352 S.C. 286, 573 S.E.2d 838 (2002).²² Therefore, neither the Bank nor any other party attempted to try the merger issue via testimony, documentary evidence or otherwise. However, the lower court then proceeded in its Moorhead Order to rule (at length) on the issue of merger.

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

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

The purported law referenced in the lower court's Moorhead Order (below) is neither a complete, nor accurate portrayal of the law on merger in this State. [**Moorhead Order, pp. 5-6, 9-10**] Rather, as is plainly evident from the chronology of opinions issued throughout the history of this State on merger, the lower court has cited the

²² Enoree Baptist Church v. Fletcher, 287 S.C. 602, 340 S.E.2d 546 (1986) ("One circuit court judge does not have the authority to set aside the order of another."); State ex rel Medlock v. Love Shop Ltd., 286 S.C. 486, 334 S.E.2d 528 (1985) ("It is well settled that one circuit court judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge.").

outdated, 19th Century version of this increasingly irrelevant legal doctrine. The failure of the lower court to not even cite the opinion that has been heralded by more recent courts of this State as both “masterful” and the “leading case in this state on the subject of merger”²³ is as uniquely troubling to the Bank as the opinion offered by the lower court on what the Bank had been led to believe by the lower court on the record as being mere “dictum”.

Despite it being well established in this State that the seminal case regarding the merger doctrine is McCreary v. Coggeshall, 74 S.C. 42, 53 S.E. 978, at 982, 7 L.R.A.(N.S.) 433, 7 Ann. Cas. 693 (1906), the lower court inexplicably claimed in its Order that:

This rule [of merger] is perhaps no more clearly stated than in the case of **Bleckley v. Branyan**, 26 S.C. 424, 2 S.E.2d 319 (1887). There the Supreme Court held:

It must be taken to be settled in that state by a long line of adjudications, both in law and equity, ‘that a mortgagee who buys the estate under mortgage not under process of foreclosure, extinguishes the debt or claim with him on the property.’

2 S.E.2d at 321; see also, 275 S.C. Jur. Mortgages § 61 (2007) and 55 Am. Jur. Mortgages § 1340 (2007) (“Ordinarily, a transfer of the interest of the mortgagor in the mortgaged property to the mortgagee operates as a merger of the two estates, which effect a discharge of the mortgage and a satisfaction of the debt.”) Therefore, based upon the doctrine of merger, Enterprise Bank was no longer a mortgagee since the mortgage and debt had been satisfied but became the fee simple owner of the property but not as a bona fide purchaser for value without notice of prior claims.

²³ See Owings v. Graham, 120 S.C. 408, at 448, 113 S.E. 279 (1922) (proclaiming the McCreary opinion to be ‘masterful’) and see McCraney v. Morris, 170 S.C. 250, 170 S.E. 276, at 279, 95 A.L.R. 622 (1933) (calling McCreary the ‘leading case in this state on the subject of merger’).

[Moorhead Order, p. 5 (emphasis added)]²⁴.

The McCreary opinion offers a unique, broad review of the history of this old, outdated English legal doctrine. In discussing the application of the McCreary case, the Supreme Court of South Carolina issued the following opinion in the McCraney case:

After reviewing many, if not all, of the former decisions of this court on the law of merger, including the Richardson and Bleckley Cases, cited in the report and decree in the lower court, Mr. Justice Woods, for this court, said: 'From this review we think it clear the later cases in this state establish the proposition, which as we have seen is in accord with the doctrine universally recognized in other jurisdictions, that in equity at least merger will not take place if opposed to the intention of the parties, affirmatively proved, or to be implied from the fact that merger would be opposed to the interest of the person in whom the different estates or interests become united. This doctrine is sustained by an unbroken current of authority in the other states of the Union.'

That the principles declared by Mr. Justice Woods are generally recognized as being just and equitable is shown by the interesting article on "Merger and Subrogation" in that excellent work, Jones on Mortgages (8th Ed.) vol. 2, beginning at page 508. Speaking on the subject of the effect of the acceptance by a mortgagee of a conveyance of the equity of redemption, the learned author, Mr. Jones, at page 521, says: "The expressed intention will control; but in the absence of such express intention on the part of the mortgagee his intention will be presumed in accordance with his interests." Further (page 523), it is said: "When there is no evidence of the intention of the owner in uniting the legal and equitable estates in himself, it is proper to presume that he intended that effect which is the most beneficial to himself. Therefore, if the estate be subject to other incumbrances, which he is under no obligation to pay, and it is better for him to preserve the lien of the prior mortgage rather than to extinguish it, and let the next subsequent incumbrance into its place of priority, these facts may be taken as sufficient ground for inferring that his intention was to preserve the mortgage rather than to extinguish it."

McCraney v. Morris, 170 S.C. 250, 170 S.E. 275, at 279, 95 A.L.R. 622 (1933); citing

²⁴ Page 6 of the Moorhead Order includes further misapplication of the law on merger in this State. [Moorhead Order, p. 6] Throughout this page of the Moorhead Order, the lower court cites non-authoritative secondary sources in an attempt to support its flawed analysis. One such cite includes a parallel cite to the case of Kirkman v. Parex, Inc., 369 S.C. 477, 632 S.E.2d 854 (2006). The Kirkman opinion, including the "discussion of facts" found therein, has absolutely no relevance to the issue of merger; rather, it deals with claims against a lender based specifically on the lender's construction of property after foreclosure – and such "discussion of facts" concern liens that were filed *before* title passed to the lender. In fact, the term 'merger' is nowhere to be found in that opinion.

McCreary v. Coggeshall, 74 S.C. 42, 53, S.E. 978, at 982, 7 L.R.A.(N.S.) 433, 7 Ann.Cas. 693 (emphasis added).²⁵

In recognition of the firmly established, current law on merger as laid out in McCreary, McCraney, Tzouvelekas, *et al.* and in light of the common knowledge that the distinguishing factors delineated therein (as compared to the prior case of Bleckley cited by the lower court) are of central issue here, the Bank finds it equally puzzling that the lower court, in its citation to the case of First Fed. Sav. And Loan Ass'n of S. Carolina v. Finn, 300 S.C. 228, 287 S.E.2d 253 (1989)²⁶, chose not to cite the entire law. In its citations to the First Fed. case, the lower court cited two sentences in the case in succession as they appear in the case. [**Moorhead Order, p. 5**] These two sentences cite only that portion of the law promulgated in the outdated 1887 Bleckley case. The lower court failed to cite the immediately following sentence in the First Fed. Case, which, oddly enough, cites McCreary and the very heart of the current merger law: "An intention to prevent merger may be implied from facts indicating merger would be opposed to the interest of the person in whom the legal and equitable interests became united and that such an intention existed at the time of the merger. McCreary v. Coggeshall, 74 S.C. 42, 53 S.E. 978 (1906)." First Fed. Sav. & Loan Ass'n of S. Carolina v. Finn, 300 S.C. 228, 231, 387 S.E.2d 253, 254 (1989).

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

²⁵ The holding in McCreary was obviously upheld by the Court in the later McCraney and Owings opinions, but it was also upheld in 1945 by the Tzouvelekas opinion, where the Court stated: "[a] merger of the lesser estate into the greater estate will not take place if such a merger would be opposed to the interest of a person in whom the different estates or interest became united." Tzouvelekas v. Tzouvelekas, 206 S.C. 90, 33 S.E.2d 73, 75 (1945) (emphasis added).

²⁶ This opinion was published in 1989, not 1998 as the lower court's order indicates.

the Deed in Lieu. The Bank had absolutely no intention to agree at any time to the extinguishment of \$5.5+ Million in debt based merely on the exchange of title to property that even the lower court described unfavorably on the record as “cement blocks or something there”.²⁷ [Trial Transcript Dec. 8, 2011, p. 205, line 5 thru p. 206, line 2] The facts, as verified in the Bank Lawsuit, make plain the Bank’s express intention in this regard when just prior to the deed in lieu of foreclosure being filed by PSL, it tried to get the Bank to sign a Deed in Lieu of Foreclosure Agreement (drafted by PSL) which included provisions making clear that, if signed, the Bank would be agreeing to merger. The Bank, in writing, unequivocally rejected this attempt by PSL to have the deficiency waived. PSL then unilaterally filed the deed without any such written agreement in place.

The undisputed facts also reveal that prior to, at the time of, and subsequent to the time when PSL filed the Deed in Lieu, PSL represented to the Bank in writing that it would be working on alternative financing to pay off the outstanding debt it still owed the Bank so that PSL could come back and finish the Project. [Trial Transcript Dec. 8, 2011, p. 54, lines 10-14; p. 159, lines 13-25; p. 162, lines 12-15; p. 167, lines 7-13] In fact, after the Bank received the Deed in Lieu with the knowledge that the deficiency was still outstanding, the Bank agreed to give PSL until late May 2007 to find alternative financing before the Bank filed suit against PSL for, *inter alia*, the deficiency. [Id.] During this time period immediately after the Deed in Lieu was filed, attorneys for PSL were in consistent communication with the attorneys for the Bank. Notably, this written correspondence involved detailed discussions regarding the amounts that PSL still owed the Bank and credits due PSL (against the outstanding debt still owed to the Bank) for the

²⁷ This description volunteered by the lower court was based on its own first-hand account of the unfinished project which it apparently obtained from going “by this project every week from the time they started until today”. [Id.]

value of the property deeded to the Bank, and the status of PSL's efforts to obtain independent financing to pay off the remaining debt it still owed the Bank. [Trial Transcript Dec. 8, 2011, p. 161, line 17 thru p. 162, line 11]

The best evidence of this understanding between PSL and the Bank is the Quitclaim Deed delivered from PSL to the Bank in July 2007 transferring The 2 Acre Tract to the Bank.²⁸ In exchange for this property, the Bank - like its handling of the Deed in Lieu - agreed to give PSL further credit against the outstanding deficiency in an amount representative of the appraised value of The 2 Acre Tract. [Trial Transcript Dec. 8, 2011, p. 161, line 17 thru p. 162, line 11] There is simply no other reason this (relatively) valuable piece of property would be deeded via quitclaim to the Bank by PSL at that time.²⁹

Further still, the mortgage at issue is still of record and was never satisfied by the Bank. In fact, the Bank brought suit (the Bank Lawsuit) against the debtors for the deficiency under the mortgage. Thus, there was no dispute at any time before, during, or after the Deed in Lieu regarding the fact that the Bank would be pursuing PSL for the deficiency owed by PSL to the Bank. And, likewise, there was no dispute that the Deed in Lieu did anything to change the Bank's position (or that of PSL) that the Bank could pursue the outstanding debt.

In other words, neither the Bank nor PSL ever intended at any point in time surrounding the Deed in Lieu that the Deed in Lieu from PSL to the Bank would act to

²⁸ On page 3 of the Moorhead Order, the lower court referred to this deed, which is of public record in its jurisdiction. [Moorhead Order, p. 3]

²⁹ The 2 Acre Tract was valuable due to the fact that 13 of the 58 units were located on it. [Trial Transcript Dec. 8, 2011, Def.'s Ex. 1, tab 1] In addition, of the two entrances to the development, the main entrance was on The 2 Acre Tract. [Id.] The other entrance was on Tract B, which at the time, was in the possession of Zellner- who was claiming that Moorhead and its subs had trespassed onto Tract B to perform their alleged work without Zellner's permission. [Id.]

merge the title to the property with the debt that PSL owed the Bank. Even ignoring the obvious intentions of the Bank, the above mentioned controlling law of this State makes plain that it should be presumed that the Bank intended the effect which is most beneficial to itself. McCraney, supra. And, in cases like the one at issue when the estate is subject to another encumbrance claim where it would be better for the Bank to preserve its lien rather than to extinguish it, “these facts may be taken as sufficient ground for inferring that [the Bank’s] intention was to preserve the mortgage rather than to extinguish it.” Id.

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

VIII. DID THE LOWER COURT ERR IN INCLUDING THE PLAINTIFF’S LOST BOND PREMIUM AMOUNT IN THE AMOUNT THE LOWER COURT AWARDED THE RESPONDENT UNDER ITS MECHANIC’S LIEN CLAIM?

The lower court concluded that Moorhead is entitled to \$33,642.00³⁰ for lost bond premiums because “the bond was set at the contract amount but the project was stopped quite short of reaching the amount of the contract.” [**Moorhead Order, p. 7**]

First and foremost, a bond premium (especially a premium such as the one here that is representative of work not yet performed) is not representative of “labor performed or furnished or [of] materials furnished and actually used in the erection, alteration, or repair of a building or structure upon real estate” (quoting S.C. Code Ann §29-5-10), and, likewise, is “not something which has attached to and become a part of the real estate,

³⁰ This amount of \$33,642.00 is more than half the amount of \$66,627.81 awarded to Plaintiff under its mechanic’s lien foreclosure claim.

adding to the value thereof'. Zepa Construction, Inc. v. Randazzo, 357 S.C. 32, 591 S.E.2d 29 (Ct.App. 2004), citing Hardin Constr. Group, Inc. v. Carlisle constr. Co., 300 S.C. 456, 457, 388 S.E.2d 794, 795 (1990).³¹

In the sentence immediately following the lower court's award of the bond amount here, the lower court denies Moorhead's request for an additional sum of money representative of its lost profits and overhead. [**Moorhead Order, p. 7**] In denying this latter amount, the lower court cites the case of Zepa Construction, Inc. v. Randazzo, 357 S.C. 32, 591 S.E.2d 29 (Ct.App. 2004).

In Zepa, the South Carolina Court of Appeals relied upon the South Carolina Supreme Court's decision in Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp., 287 S.C. 346, 338 S.E.2d 631 (1985), in making the following determination regarding "lienable items" when a contract is prematurely terminated (as was the case here):

overhead and profit, when stated as part of the contract price, are proper components of a mechanic's lien. ... such items, as such and standing by themselves, are nonlienable, but they become lienable ... in the limited situation where the terms of overhead and profit are agreed upon by the parties and are subsequently embodied within a contract.

Zepa at 37-40, 591 S.E.2d at 31-33 (omitting internal citations).

In reaching the conclusion that Moorhead in this action was not entitled to its lost profits and overhead and by basing this determination on the Zepa case, the lower court's award of 'lost bond premium' is improper. As with Zepa, the contract between Moorhead and PSL, as entered of record by Moorhead in this matter, does not provide for

³¹ The Bank cannot find any court of any jurisdiction within the United States that has found that a bond premium representative of work not completed is lienable. In the only relevant case found by the Bank, the Appellate Court of Illinois found in the case of Atlee Electric Company, Inc. v. Johnson Construction Co., 14 Ill.App.3d 716, 303 N.E.2d 192 (1973), that the cost of a performance bond premium was not recoverable under a mechanic's lien because it is not a charge for material or labor. Id. at 727, 303 N.E.2d at 200-201.

payment of bond premiums, including bond premiums representative of work yet to be completed. **[Trial Transcript Dec. 8, 2011, Plaint.'s Ex. 4]** Like lost profits and overhead, Moorhead cannot recover an amount for its lost bond premium because it was not specifically provided for in the contract. Zepssa, supra.

In addition, ignoring the law as outlined above and assuming *arguendo* that the lower court's reasoning was proper, the actual amount of the lower court's award is in error. The testimony and evidence produced in this case plainly show that Moorhead's claim for 'lost bond premium' was for only that amount of the bond premium representative of the work not completed by Moorhead under its contract with PSL. **[Trial Transcript Dec. 8, 2011, Plaint.'s Ex. 6; Def.'s Ex. 1, tab 19; p. 78, line 21 thru p. 79, line 2]** Pursuant to the representations made by Moorhead's own counsel in the aforementioned February 2007 letter to PSL, it is made abundantly clear that this "unnecessary additional bond premium actually paid" amounts to \$20,975.39 and not the \$33,642.00 amount referenced in the same letter as being the total bond premium paid by Moorhead. **[Id.]**

The lower court's ruling regarding Moorhead's alleged lost bond premium was in error and should be reversed.

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

Moorhead made clear in the only testimony provided on its behalf that there are only "two separate actions for damages that [Moorhead has] ... one is for the mechanic's lien issue against the Bank but [Moorhead] also [has] a breach of contract claim against Pendleton Station, LLC." **[Trial Transcript Dec. 8, 2011, p. 64, lines 14-19]** Mr. Moorhead also testified that he agreed that the Bank doesn't owe Moorhead any money

on the contract because Moorhead never had a contract with the Bank.³² [Trial Transcript Dec. 8, 2011, p. 68, lines 12-15] At the conclusion of each cause of action in its Complaint, Moorhead made a prayer for relief specific to each such cause of action. [Compl.] While Moorhead specifically requested pre-judgment interest in its prayer for relief in both its Breach of Contract and Unjust Enrichment causes of action, Moorhead did not make a request for pre-judgment interest on its Mechanic's Lien Foreclosure cause of action. [Compl.]

S.C. Code Ann. § 34-31-20 provides in pertinent part:

(A) In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum.

S.C. Code Ann. § 34-31-20. It is well settled that pre-judgment interest is not automatically applied to judgments in this State. T.W. Morton Builders, Inc., v. von Buedingen, 316 S.C. 388, 450 S.E.2d 87 (Ct. App. 1994). In a long line of case law, the courts of this State have acknowledged the established rule that pre-judgment interest is only appropriate on liabilities to pay money from the time when, either by agreement of the parties or operation of law, the payment was demandable, if the sum is certain. Id. “Stated another way, prejudgment interest is allowed on a claim of liquidated damages; i.e., the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties.” Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 133, 631 S.E.2d 252, 258-59 (2006). The proper test for determining whether pre-judgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim

³² As established *supra*, the personal judgment entered against the Bank was wholly improper, such that the prejudgment interest award added thereto by the lower court is also improper.

arose. Id.

According to the lower court's Order, the claim against the Bank did not arise until the time when the Bank took title to the property. [**Moorhead Order, pp. 5-6**] The conditions existing at that time reveal that the Bank had not agreed to any amount owed Moorhead because the Bank had no notice of Moorhead's claims at that time.³³ [**Trial Transcript Dec. 8, 2011, p. 67, line 25 thru p. 68, line 11**] In a number of construction-related cases, the courts of this State have denied pre-judgment interest to a builder where the builder failed under its burden at trial to establish a stated account and failed to establish that there was an agreement in place between builder and defendant regarding whether the account is a true statement due at a specific point. T.W. Morton Builders, Inc., v. von Buedingen, 316 S.C. 388, 399, 450 S.E.2d 87, 93 (Ct. App. 1994); See also S. Welding Works, Inc. v. K & S Const. Co., 286 S.C. 158, 164-65, 332 S.E.2d 102, 106 (Ct. App. 1985). In such cases, the defendant vigorously disputed the builder's rights to the amounts purportedly due. Id. "The essential elements of an account stated are (1) that the account is actually stated; and (2) that the parties either expressly or impliedly agreed that it is a true statement and is due to be paid then or at some other specified time." Id.(emphasis added).

As with the above referenced cases, there is nothing in the record before us that would indicate the Bank and Moorhead ever had an agreement regarding monies purportedly due Moorhead, such that the damages alleged here cannot be 'liquidated'. In fact, Moorhead produced no documents generated from the Project showing what exactly it was due on the Project, or that otherwise supported the exact amount it claimed as

³³ The Plaintiff even testified that it didn't even know who Enterprise Bank was prior to the Deed in Lieu. [**Trial Transcript Dec. 8, 2011, p. 70, lines 7-18**]

damages at trial. In addition, there is nothing in the record before us that makes clear that any law provides the payment is demandable of the Bank. Further, the Bank had no knowledge of Moorhead's claim when it became the record owner of the property, the Bank vigorously disputed Moorhead's right to the amounts alleged to be due, and Moorhead did not otherwise prove that the Bank had entered into any agreement with Moorhead signifying that Moorhead's statement of account was true and due to be paid at a specified time.³⁴ In fact, the documents admitted into evidence at trial, including the letter from Moorhead's own attorney, clearly indicated that the underlying contract between Moorhead and PSL was mutually at least a month before the Bank became the owner of the property.

Thus, an award of pre-judgment interest against the Bank is improper and should be reversed.

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

In ruling that Moorhead was the prevailing party in this case, the lower court based its determination on the 1997 maritime case of Seckinger v. Vessel Excalibur, 483 S.E.2d 775, 778, 326, S.C. 382, 388 (Ct. Ap.1997). The Seckinger case is not authoritative on the issue of prevailing party. The controlling law on this issue is the 2005 version (together with the 2001 amendments) of S.C. Code Ann. § 29-5-10, and the provisions found therein defining 'prevailing party'. Lauro v. Visnapu, 351 S.C. 507,

³⁴ From a practical standpoint, the inclusion of pre-judgment interest as an award under a mechanic's lien foreclosure claim under the facts of this case does not support the legislature's intent – through the emphasis it has supplied in the mechanic's lien statute on settlement – at promoting the civil, timely resolution of mechanic's lien claims. Rather, the 8.75% pre-judgment interest rate, if applied to mechanic's lien causes of action such as the one here, would be viewed (as is the case here) as a fairly significant investment (especially during these economic times in the construction industry) and would actually promote the lengthy litigation of such claims (such as the case here), completely undermining the legislature's attempt at promoting the timely and civil resolution of such claims.

518-519, 570 S.E.2d 551, 557 (2002).³⁵ Based on the more recent legislative history and judicial precedent established in this State in connection with this narrow issue, it remains clear that the Bank is the prevailing party under the statute. Id.

Since the time when the Seckinger opinion was published, it has been established in South Carolina that the prevailing party is the one whose statutory settlement offer is closer to the judgment amount, and not simply the party for whom favor judgment is granted, as provided in Seckinger. S.C. Code Ann. § 29-5-10. In situations such as the one here where neither party makes a written offer of settlement, the defendant's statutory "offer of settlement" is deemed to be zero and the plaintiff's statutory "offer of settlement" is deemed to be the amount prayed for in its complaint. Id.; JRS Builders Inc., v. Neunsinger, 364 S.C. 596, 614 S.E.2d 629 (2005); Lauro v. Visnapu, 351 S.C. 507, 518-519, 570 S.E.2d 551, 557 (2002).

Here, the lower court rendered judgment in the favor of Moorhead on its mechanic's lien claim in the amount of \$66,627.81. [**Moorhead Order, pp. 7-8**] The amount prayed for by the Plaintiff in its un-amended mechanic's lien and un-amended Complaint was \$401,729.00. [**Moorhead Lien**] The evidence produced by Moorhead prior to trial made it clear that the amount prayed for by Moorhead was the sum of only the debt allegedly owed to Moorhead – not any additional debts owed to Miller or Craft. [**Trial Transcript Dec. 8, 2011, Def.'s Ex. 1, tab 19**] However, at trial (perhaps in recognition of its overreaching lien claim), Moorhead made the claim that the amounts owed to Miller and Craft (the same amounts found in Miller and Craft's own liens- the

³⁵ "If neither party made a written offer of settlement under the pre-amended version of the statute, § 29-5-10 would not apply, and the determination of a prevailing party would be within the sound discretion of the trial judge. Seckinger v. Vessel Excalibur, 326, S.C. 382, 483 S.E.2d 775 (Ct. Ap.1997). Subsequently, the statute was amended to provide that if the defendant makes no written offer of settlement and makes a counterclaim, the value of his counterclaim is considered to be his negative offer of settlement. S.C. Code Ann. § 29-5-10(b) (Supp.2001)."

“Miller Lien” and the “Craft Lien”) were actually a part of Moorhead’s lien. **[Trial Transcript Dec. 8, 2011, p. 62, lines 8-15]**

Moorhead never amended its lien amount nor made any offer of settlement; therefore, the amount of \$401,729.00 is deemed Moorhead’s offer of settlement under S.C. Code Ann. §29-5-10. The Bank made no offer of settlement, and did not counterclaim; therefore, its offer of settlement under S.C. Code Ann. § 29-5-10 is deemed to be zero. **[Ans.]** \$66,627.81 is closer to zero than it is to \$401,729.00. Thus, the Bank is the prevailing party under the statute.

The record reflects that even counsel for Moorhead considered the aforementioned correct ‘closest to the judgment’ statutory prevailing party analysis in its arguments to the court, although misapplying the same. Counsel for Moorhead argued that Moorhead was the prevailing party because the amounts awarded to Moorhead (\$66,627.81) together with those amounts which the lower court awarded to Moorhead’s subcontractors³⁶ amounted to \$247,730.94, which is more than half of the difference between Moorhead’s mechanic’s lien amount of \$401,729.00 and \$0.00 – half of the difference being \$200,864.50. Of course, the basis of this argument relies solely on Moorhead’s erroneous inclusion in its lien of not just those amounts allegedly due it but also those amounts allegedly due its subcontractors. The lower court concurred with Moorhead’s reasoning by stating the following in its Order:

Enterprise Bank also argues that it is the prevailing party in this action since the amount awarded directly to Moorhead is less than one-half of what was claimed as being owed by Moorhead in its pleadings. This argument ignores the fact that the amount Moorhead claimed in its pleading included the amounts that it owes to Miller Construction and Craft Construction by virtue of its contracts with each of those

³⁶ \$70,000.00 under the “Craft Order” and \$111,103.13 under the “Miller Order”) **[Miller Order, Craft Order]**

subcontracting entities. As previously stated herein, this Court has awarded Miller Construction a principal balance of \$70,000.00, plus statutory prejudgment interest on both claims. However, this Court has awarded those amounts directly to Miller Construction and Craft Construction by virtue of separate orders. Those amounts are not to be ignored though in determining who is the prevailing party in this matter.³⁷ While these are technically three (3) separate cases, they were all tried at the same time and even Enterprise Bank has handled and treated all three (3) cases as one larger case.³⁸ This results in a total principal balance in this matter being awarded to Moorhead in the amount of \$247,730.94 plus statutory prejudgment interest. This amount is greater than one-half of the difference between the amount Moorhead claimed in its pleading and the zero amount claimed by Enterprise Bank to be owed to Moorhead.

[Moorhead Order, p. 8]. By (mis)applying the statutory ‘closest to the judgment’ analysis, the lower court also confirms that S.C. Code Ann. § 29-5-10 is controlling here, not Seckinger.

Notwithstanding the lower court’s erroneous application of the controlling law, the lower court’s order is entirely contradictory. The lower court on one hand finds on page 8 of its Order that “a total principal balance in this matter being awarded to Moorhead in the amount of \$247,730.94”. Id. Yet, no more than one page earlier in its Order and again no more than one page later in, most importantly, the conclusion portion of its Order, the lower court finds that the actual principal amount owed to Moorhead is \$66,627.81. **[Moorhead Order, pp. 7-9]** So, the lower court’s own Order proves that its

³⁷ Those amounts *are* to be ignored in this case. However, even not ignoring those amounts, the simple mathematical computation of the 3 different lien amounts also disproves the lower court’s finding as the total amount sought by all 3 lienholders (allegedly exclusive of the others) together totals \$474,353.17 (Craft:\$101,536.36 + Miller:\$111,784.00 + Moorhead:\$261,032.81), which is \$72,624.17 more than Moorhead’s total lien amount (allegedly inclusive of its subs) of \$401,729.00.

³⁸ This statement is entirely untrue. This statement is not supported by anything on the record or otherwise. In all instances throughout the litigation of this case and the Miller and Craft cases, all of the pleadings have been filed under separate caption and case number. Moreover, all of the orders issued by the lower court have been filed under separate caption and case number. Further, the Bank never treated all three of these cases as one larger case. Neither the lower court nor Moorhead can point to any document, argument or otherwise generated by the Bank which could in any way support the notion that the Bank treated all three of these cases as one large case. Further still, the lower court states in its very Order that “these are technically three (3) separate cases” and “these matters were not consolidated.” **[Moorhead Order, pp. 2, 8]**

analysis referenced above is completely flawed. This is especially true in light of the fact that Moorhead's subcontractors filed their own separate liens and their own separate lawsuits (all using the same attorney and never consolidating them per S.C. Code Ann. 29-5-170), resulting in separate judgments issued by this same lower court in favor of those separate subcontractors. **[Miller Order, Craft Order]** Moorhead simply cannot have it both ways here.

The language of S.C. Code Ann. § 29-5-10(a) is clear:

A person to whom labor is due for labor performed or furnished or for materials furnished and actually used in the erection, alteration, or repair of a building or structure upon real estate ... shall have a lien upon the building or structure ... to secure the payment of the debt due to him.

S.C. Code Ann. § 29-5-10(a) (emphasis added). This dichotomous ruling completely ignores the statutory mechanic's lien scheme of this State by essentially legitimizing efforts for duplicative recovery in matters such as these. This ruling completely disregards the statutory scheme, undermines the legislature's attempts to deter the wrongful filing of liens and to foster settlement and it ignores the otherwise apparent prejudicial effects this practice has on lien debtors such as the Bank.³⁹

As part of this State's statutory mechanic's lien scheme, S.C. Code Ann. § 29-5-170 provides that multiple lienors "may join in the same petition for their respective liens and the same proceedings shall be had in regard to the rights of each petitioner and the respondent may defend as to each petitioner in the same manner as if he had severally petitioned for his individual lien." S.C. Code Ann. § 29-5-170. Yet, despite this statutory provision outlining the procedure necessary for Moorhead and its subs to properly file a

³⁹ It is well known in South Carolina jurisprudence that the primary purpose of the prevailing party provision in the statutory mechanic's lien scheme and the legislature's intent behind it stems from a desire to deter both wrongful filing of liens and unjustified refusal to pay debts subject to the mechanics' liens. Cedar Creek Properties v. Cantelou Associates, Inc., 320 S.C. 483, 465 S.E.2d 774 (Ct.App. 1995).

joint lien, they failed to do so.⁴⁰ Instead, Moorhead and its subs voluntarily chose to file separate liens (the “Craft Lien” and the “Miller Lien”) and litigate them separately under separate cases for over four (4) years without amendment – all the while, this prevailing party/lien amount was hotly disputed. **[Miller Lien, Craft Lien]** In so doing, Moorhead (and its subs) chose to subject itself to the effects of filing a lien for an amount that has now been proven to be far more than what Moorhead was owed. The acts of Moorhead in choosing to ignore the well known statutory scheme cannot be overlooked – especially in light of the fact that Moorhead’s counsel (with the knowledge of Moorhead) also represented Miller and Craft throughout the 4+ years each of their cases was litigated.⁴¹

[Miller Order, p. 1; Craft Order, p. 1]

Another prejudicial effect of the lower court’s ruling is that it significantly alters the statutory rights of lien debtors (such as the Bank) to bond off the lien per S.C. Code Ann. § 29-5-110 at the statutory rate of one and one-third times the proper amount claimed due. Applying the lower court’s ruling to the facts before us, the Bank would have had to post a bond in the Moorhead case equivalent to almost three times the amount properly alleged due, a difference of \$283,716.08.⁴² This inequity is surely not what the legislature intended when it ratified these statutory sections.

The lawsuit filed by Moorhead was litigated for over four (4) years. All the

⁴⁰ The testimony of Moorhead is striking - alleging on one hand that its lien included the amounts owed to its subs, but on the other hand Moorhead admits to “exclud[ing] that for purposes of [its] testimony” concerning what exactly is owed under its mechanic’s lien. **[Trial Transcript Dec. 8, 2011, p. 62, lines 8-15]**

⁴¹ And, also in light of the lower court’s determination regarding the experience of Moorhead’s counsel being “well versed in these matters.” **[Moorhead Order, p. 8]**

⁴² Under the lower court’s reasoning, the Bank would have had to post a bond in the amount of: \$534,299.57 to have Moorhead’s lien of \$401,729.00 released (while still having to post bonds in the amount of \$148,784.00 to have Miller’s lien of \$111,784.00 released, and \$135,043.35 to have Craft’s lien of \$101,536.36 released, despite the fact that Moorhead’s lien allegedly includes the amounts owed to Craft and Miller). Whereas, if the lower court’s ruling on the lien amounts was otherwise ‘proper’ in light of the statutory guidelines, the Bank would have had to post a bond in the amount of \$250,583.49 to have Moorhead’s lien released, a difference of \$283,716.08.

while, interest, the Bank's attorney's fees and costs escalated. Throughout the litigation, the amount alleged in Moorhead's mechanic's lien was at issue, as was the property that the lien encumbered, and the baseless breach of contract claim against the Bank. **[Maddox Order]** During this time frame, Moorhead did not initiate any discovery, to include noticing any depositions or even serving *any* written discovery. In order to defend against the manufactured claims of the lawsuit, the Bank was forced to serve extensive discovery and notice numerous depositions.

Throughout the discovery process, it remained clear that Moorhead did not have any basis for: its mechanic's liens against the property, to include the amounts sought in the lien and the property encumbered by the lien; and its breach of contract claim against the Bank. Despite the clarity of the facts, Moorhead never amended its Complaint or its lien nor did Moorhead otherwise dismiss any of its baseless claims. The Bank was forced to file a number of dispositive motions. In his order, Judge Maddox recognized the misplaced, over-reaching efforts of Moorhead by issuing summary judgment in favor of Enterprise Bank on Moorhead's bogus breach of contract claim and on the bogus lien it filed against The 38 Acre Tract. **[Maddox Order]**

Despite the Bank having to litigate this baseless lien claim of Moorhead over the course of 3.5 years and obtaining a judgment dissolving the lien on The 38 Acre Tract, the lower court did not award the Bank its attorneys' fees and costs under S.C. Code Ann. § 29-5-10. The courts of this State have made clear that a defendant to a mechanic's lien claim has the right to collect attorney fees and costs under § 29-5-10 when it prevails on such a dispositive motion. Keeney's Metal Roofing, Inc. v. Palmieri, 345 S.C. 550, 554-555, 548 S.E.2d 900, 902-903 (2001); Cedar Creek Properties v. Cantelou Associates,

Inc., 320 S.C. 483, 486, 465 S.E.2d 774, 775-776 (1995). At a minimum, the Bank should have been awarded its attorneys' fees and costs in successfully defending against Moorhead's wrongful lien as against The 38 Acre Tract. It is illogical and patently unfair for the lower court not to take this liened parcel into account when ruling in favor of Moorhead when, under the same premise offered by the lower court, it would have had to take it into account if it ruled in favor of the Bank. This very type of inequity to the lien debtor is the reason the Statute was amended in 2001. Moreover, by allowing a lien creditor to hold a 38 acre tract hostage for over 3.5 years without any basis whatsoever for doing so (all the while trying to litigate its claims against 3 other unrelated properties) is exactly the inequity the legislature of this State was trying to curb when it included the prevailing party provision in the mechanic's lien statute.

For the reasons stated above, it was in error for the lower court to determine that Moorhead was the prevailing party under S.C. Code Ann. § 29-5-10. The lower court's ruling should be reversed and the Bank should, by law, be deemed the prevailing party.

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

The attorney fee amount of \$39,000.00 that was awarded *sua sponte* by the lower court to Moorhead is almost 60% (sixty percent) of the principal amount (\$66,627.81) awarded to Moorhead by the lower court. [**Moorhead Order, pp. 7-9**] Based on the fact that Moorhead provided absolutely nothing to the lower court or to the Bank in support of its claim for attorney's fees that could in any way support a specific amount, it is presumed that the lower court merely awarded the above amount based on a completely arbitrary percentage of recovery. [**Trial Transcript Jan. 24, 2012, p. 26, line 12 thru p. 27, line 8**]

It is undisputed in this case that the basis of any attorney fee amount is statutory-S.C. Code § 29-5-10. The courts of this State have recently found in cases such as this where the State statute includes a prevailing party provision for attorneys' fees that "an award of [attorney's] fees based on a percentage of the prevailing party's recovery is improper." S.C. Department of Transportation v. Revels, 399 S.C. 423, 428, 731 S.E.2d 897, 899 (Ct.App. 2012); quoting Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008). When an award of attorney fees is requested and authorized by contract or statute, the trial court must make specific findings of fact on record as to the nature, extent, and difficulty of services rendered, time and labor devoted to case, professional standing of counsel, contingency of compensation, customary fee charged in locality, and beneficial results obtained, before awarding a specific amount of fees. Collins v. Collins, 239 S.C. 170, 122 S.E.2d 1 (1961); see also Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993).

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

Further, when other claims are contested in a lawsuit in addition to a mechanic's lien cause of action, the trial court abuses its discretion as to the amount of the attorney fees awarded under S.C. Code Ann. § 29-5-10, *et seq.*, when a finding is not made on the

record as to the specific amount of time/fees spent by the prevailing counsel on just the mechanic's lien cause of action only. Utilities Const. Co., Inc. v. Wilson, 321 S.C. 244, 250, 468 S.E.2d 1, 4 (Ct. App. 1996). In other words, when a plaintiff such as the one here asserts claims like unjust enrichment and breach of contract in addition to its mechanic's lien claim, an award of attorney fees to the plaintiff under the mechanic's lien claim must reflect the time spent only on that cause of action and not the time spent on prosecuting any of the other causes of action. Id. There were no specific findings of fact made on the record with respect to the amount of attorney fees requested by counsel for Moorhead, to include what was actually incurred by Moorhead, the segregated amount incurred by Moorhead on just the Mechanic's Lien portion of the lawsuit, or the contractual fee arrangement that counsel for Moorhead entered into with Moorhead.

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

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

CONCLUSION

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

Respectfully submitted,



Thomas E. Dudley, III (SC Bar# 66154)

M. Stokely Holder (SC Bar# 73892)

KENISON, DUDLEY & CRAWFORD, LLC

704 East McBee Avenue

Greenville, SC 29601

(864) 242-4899

Attorneys for Appellant

March 4, 2013
Greenville, SC