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-04-2786
(Appellate Case No. 2012-213318)

Miller Construction Company, 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

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STATEMENT OF THE CASE

On April 17, 2007, Respondent, Miller Construction Company, LLC ("Miller"), filed one Mechanic's Lien ("Miller Lien") against four (4) separate pieces of real property. [**Miller Lien**] In the Miller Lien, Miller alleged that it was owed $111,784.00 for work that it allegedly performed on the four separate parcels. Miller also alleges that its last date of work was on March 6, 2007.

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

Benjamin L. Daniel. [**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. Miller specifically pled in each cause of action that it was damaged under the specific cause of action in the amount of $111,784.00.

The Bank filed its Answer denying all of Miller's claims. [**Ans.**] The Bank alleged in defense, *inter alia*, that Miller's claims were barred because the Bank had no legal or equitable duty to pay Miller for any work alleged to have been performed by Miller, and because both the prior deed to the Bank and the Bank's prior, unsatisfied mortgage were senior to Miller's subsequent mechanic's lien as against two of the four liened properties. Zellner, in its Answer to Miller's Complaint, included counterclaims alleging that Miller trespassed onto Zellner's "Tract B" to perform the alleged work ("Zellner Answer"). **[Zellner Answer]**

Miller conducted no discovery in this case.

After the Bank was served with Miller's lien and lawsuit, the Bank made several good faith attempts to get Miller 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 Miller on June 3, 2008; however, Miller did not timely respond to the Bank's Interrogatories and Requests for Production. After repeated requests, Miller finally answered the Bank's Interrogatories on February 26, 2009. However, after additional attempts by the Bank to get Miller to respond to the remaining discovery failed, the Bank filed a Motion to Compel on July 14, 2009. The Bank also served a Rule 30(b)(6), SCRCP, Notice of Deposition on Miller together with a Notice of

Deposition on Miller's principal, Mike Miller. Due to Miller's failure to produce complete responses to the Bank's discovery requests, the Miller depositions were postponed. The depositions were ultimately taken on September 14, 2009.

The Bank filed a Motion for Partial Summary Judgment seeking, *inter alia*, the dismissal of Miller's Breach of Contract claim against the Bank and the dismissal of Miller's Mechanic's Lien. As part of the Bank's Motion regarding the cancellation of Miller's Lien, the Bank asked for attorneys' fees and costs pursuant to S.C. Code Ann. § 29-5-20, *et seq.* That Motion was heard on September 10, 2010. By Order of the Honorable J. Cordell Maddox, Jr. ("Maddox Order"), the Bank's Motion was granted with respect to Miller's Breach of Contract claim against the Bank, and with respect to Miller'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**]

Due to the factual similarities between Miller's lawsuit and the separate lawsuits filed by two other contractors on the same Project[1], the lower court tried all three (3) cases at the same time.[2] [**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. **[Trial Transcript Jan. 24, 2012, p. 27, line 24 thru p. 28, line 17; Miler Order, pp. 2, 8]**

[1] Craft Construction Company, Inc. of Starr ("Craft") and Moorhead Construction, Inc. ("Moorhead")

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

Prior to trial, Miller 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"). **[Pre-trial Order]** This left only the Bank, PSL and Angelo Penza as Defendants – with claims against only the former two. Also before taking testimony at trial, the lower court heard the Bank's previously filed Motion for an Award of its Attorneys' Fees and Costs. **[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 Miller's lien claim against the remaining three liened properties.

At the close of Miller's case, the Bank moved for directed verdict as to Miller'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]** The lower court denied the Bank's Motion after Miller argued that there was sufficient evidence entered into the record to support Miller's claims.

At the close of the Bank's case, after brief reply testimony, and after brief questioning by the lower court, the lower court immediately ruled on Miller's claims. **[Trial Transcript Dec. 8, 2011, p. 206, line 25 thru p. 207, line 6]** The lower court ruled that Miller's lien was valid in the amount of $111,103.13, plus pre-judgment interest **[Id.]** The lower court ordered the record remain open pending a subsequent hearing before it on the S.C. Code Ann. § 29-5-20, *et seq.* "prevailing party" issue. **[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 Miller

was the "prevailing party" in accordance with S.C. Code Ann. § 29-5-20, *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 Miller should be awarded attorneys' fees in the amount of $45,000.00 plus costs without any request for such amount from Miller and without taking any testimony or reviewing any documentation as to the actual amounts incurred. **[Trial Transcript Jan. 24, 2012, pp. 1-30]** 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 Miller's counsel propose an order and share same with the Bank. Over the Bank's objection, the lower court subsequently signed the 'Final Order and Judgment' ("Miller Order") exactly in the form proposed by Miller. **[Miller Order]** The Miller Order was signed and filed on June 7, 2012. The Bank received the Miller Order on June 13, 2012.[3]

In the Miller Order, the lower court awarded Miller a personal, money judgment against the Bank under Miller's Mechanic's Lien Foreclosure claim in the amount of $199,831.86.**[Id., p. 10]** This amount is apparently representative of a $111,103.13 principal debt owed to Miller plus $42,936.89 in pre-judgment interest, $45,000.00 in attorneys' fees, and $791.66 in costs.**[Id., pp. 8-10]** Also in the Miller Order, the lower court awarded the foreclosure of Miller's Mechanic's Lien finding the total lien amount to be the same $199,831.86.**[Id, p. 10]** The lower court did not award Miller any damages

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

for either its Breach of Contract claim or its Unjust Enrichment claim against any party. **[Miller Order]** Miller did not file an appeal.

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 Miller Mechanic's Lien. **[Miller Order, pp. 4-7, 10-11]** The lower court also ruled in its order that the doctrine of merger applied when the Deed in Lieu of Foreclosure was filed such that the August 2005 unsatisfied mortgage from PSL to the Bank on the same property should be deemed satisfied. **[Id.]** In so ruling, the lower court concluded that Miller'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), SCRCP, 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 Miller 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 Miller. **[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. Craft did not file an appeal.

STATEMENT OF FACTS

The underlying lawsuit centers on Respondent Miller's alleged construction work as a subcontractor on a failed mixed-use development project known as Pendleton Station, located in the Town of Pendleton within Anderson County, South Carolina. **[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; See map: 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 stating 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. **[Trial Transcript Dec. 8, 2011, Def. Ex. 1, tab 2]**

Moorhead contracted with developer PSL to be the general contractor for the horizontal construction on the Project. **[Trial Transcript Dec. 8, 2011, Plaint. Ex. 4]** Moorhead obtained a payment bond for the purpose of securing payment to any subcontractors that Moorhead may hire on the Project. (the "Payment Bond") **[Trial Transcript Dec. 8, 2011, pp. 124, line 15 thru p. 125, line 2]** Moorhead, in-turn, entered into subcontracts with Respondent Miller and Craft to perform portions of this work on the Project. **[Trial Transcript Dec. 8, 2011, p. 60, lines 7-12]**

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

In December 2005, while 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.

[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-phases that did not materialize. **[Maddox Order, p. 3; Bank's Memo in Support of SJ, Ex. A]**

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 the Bank. **[Trial Transcript Dec. 8, 2011, p. 158, lines 6-15, Def. Ex. 1, tab 5]** PSL deeded the Project to the Bank in lieu of foreclosure on March 5, 2007 (the "Deed in Lieu").[5] **[Trial Transcript Dec. 8, 2011, Def. Ex. 1, tab 6; Bank Lawsuit pp. 9-10]** The Deed in Lieu transferred only Tract A and The 38 Acre Tract less the units previously sold to the individual unit owners in fee simple.

Upon the Bank's receipt of the Deed in Lieu, the Construction Loan agreements were still in place between the Bank and the fee simple owners of the 58 townhome units. **[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.[6] **[Trial Transcript Dec. 8, 2011, p. 15, lines 1-23]**

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

[6] 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.

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 (and prior to seeking legal counsel), the Bank immediately paid these contractors in an effort to avoid liens/lawsuits being filed against each of the 58 units/unit-owners. Over the course of the following weeks, growing questions and concerns arose regarding PSL's use of the loan proceeds and the material representations that PSL and its affiliates had made to the Bank, the individual unit-owners, the Town of Pendleton, and others.**[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 began to uncover the magnitude of both PSL's misappropriation of Development Loan funds and PSL's material misrepresentations. **[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. 10-13]** The subsequently filed "Amended Bank Lawsuit" alleged that PSL

failed to mortgage Tract B and The 2 Acre Tract as security for the Development Loan in accordance with the terms of the Promissory Note.[7] **[Amended 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]** Notably, the Bank never satisfied the August 2005 Mortgage to the Bank from PSL, which was filed against Tract A and The 38 Acre Tract to secure the Development Loan.

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]** Zellner deeded Tract B to 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.[8] **[Trial Transcript Dec. 8, 2011, p. 162, line 16 thru p. 163, line 4]**

On August 31, 2007, Miller filed the underlying lawsuit. **[Compl.]** Strikingly, Miller made no claim against Moorhead in its Complaint, as Miller did not even name Moorhead as a defendant. Of equal significance, Miller never filed a bond claim against Moorhead's Payment Bond for the amount Miller claims it is due for the work it allegedly performed under its contract with Moorhead. **[Trial Transcript Dec. 8, 2011, p. 69, line 17 thru p. 70, line 2; p. 98, lines 4-7]**

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

[8] Unfortunately, this decision came just before the real estate collapse of late 2007, which- together with Miller'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.

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 Miller Order, the only cause of action upon which Miller prevailed (against any Defendant) was its mechanic's lien foreclosure claim. **[Miller 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 $199,831.86. **[Miller Order, p. 10]**

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."). 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.[9] Sea Pines Co. v. Kiawah Island Co., 268 S.C. 153, 232 S.E.2d 501 (1977).

Further, a party such as the Bank should not be made to bear a loss that rightfully belongs to another. Unison Ins. Co. v. Hertz Rental Corp., 312 S.C. 549, 436 S.E.2d 182 (Ct.App. 1993). Likewise, Miller, in seeking equity, must do equity. Whetstone v. Whetstone, 309 S.C. 227, 420 S.E.2d 877 (Ct.App. 1992). *The testimony of Miller at trial*

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

makes clear that Moorhead is who Miller worked for on the Project, and with whom Miller had contracted for such work on the Project, and *the party who owes Miller for that work on the Project – not the Bank.* **[Trial Transcript Dec. 8, 2011, p. 95, line 5 thru p.99, line 15; p. 110, line 18 thru p. 113, line 8]** So, the damages Miller was owed was due to the failure of Moorhead to pay the invoices that Miller had submitted for the work Miller alleged to have completed. **[Id.]** Moreover, Miller testified that it did not have a contract with the Bank. **[Trial Transcript Dec. 8, 2011, p. 95, lines 5-8]** Further, Miller testified that Miller did not know that the Bank was involved as the lender on the Project until after the Deed in Lieu and that Miller had no conversation with anybody at the Bank prior to the Deed in Lieu. **[Trial Transcript Dec. 8, 2011, p. 96, line 20 thru p. 97, line 1]** Further still, not only did Miller not file a claim against Moorhead's Payment Bond[10] (which would have virtually guaranteed Miller payment without the unnecessary incurrence of interest and attorney's fees), Miller did not file a claim against Moorhead in its lawsuit or even name Moorhead as a defendant in the lawsuit. **[Compl.]**

The actions of Miller here[11] are comparable to what transpired in the cases of Glidden Coatings & Resins, Div. of SCM Corp. v. Suitt Const. Co., Inc., 290 S.C. 240, 349 S.E.2d 89 (Ct.App. 1986), and City Lumber Co. v. National Surety Corp., 229 S.C. 115, 92 S.E.2d 128 (1956). In those cases, a joint check was issued to a subcontractor and the subcontractor's materialman for work completed on a project. Both joint payees endorsed the check, but the materialman allowed the subcontractor to retain funds out of

[10] Prior to filing its April 17, 2007 mechanic's lien, Miller was aware of the Payment Bond that Moorhead had on the Project, which guaranteed payment to Miller for any work Miller completed on the Project. **[Trial Transcript Dec. 8, 2011, p. 98, lines 2-7]**

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

the check representative of the debt still owing the materialman, rather than requiring the subcontractor to pay the materialman in full out of the check proceeds. The South Carolina Court of Appeals in Glidden and the Supreme Court in City Lumber held that the action of the materialman in endorsing the joint check without collecting the past due amount from the subcontractor out of the same check released the innocent general contractor and its surety from liability for such indebtedness. Id. In each case, the Court viewed this result as following from two well recognized rules of law:

> (1) when a creditor has in his hands the means of satisfying his debt out of the property of his principal debtor, and does not use it, but gives it up, the surety on the debt is discharged; and (2) where one of two innocent parties must suffer a loss, it must be borne by that one of them, who, by his conduct, has rendered the injury possible. As a named payee on the check, the materialman had a right to satisfy its debt in full from the check proceeds. By its own conduct, it let that position of advantage slip away. It would be patently unfair in such circumstances to allow the party who could have protected his own interest to shift the consequences of his neglect to another who had no duty to protect him.

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

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

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

Craft's Mechanic's Lien was filed under S.C. Code Ann. §§ 29-5-20, 29-5-40, *et seq.* [12] It is inherent within these code sections, and perhaps the most fundamental aspect of all mechanic's lien law, that a valid underlying debt be in existence for the lien to suffice. S.C. Code Ann. § 29-5-20[13]; S.C. Code Ann. § 29-5-40[14]. This principle could not be made any clearer than in the opinion rendered by the South Carolina Court of Appeals in the Glidden case, supra:

> The predicate for recovery in any [mechanic's lien foreclosure] suit[] is the existence of an unpaid debt. This is abundantly clear from a reading of the mechanic's lien statute ... As we have had occasion to observe in another context, a valid security interest cannot exist without a valid underlying debt. See Blackwell v. Powell, 346 S.E.2d 731 (S.C.Ct.App. 1986)(mortgage).

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

In order for the lower court to determine that a valid debt is due Miller under the mechanic's lien scheme, there must be a party that is obligated to pay the debt.[15] In this case, the only determination the lower court made that can possibly be construed as a

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

[13] A primary purpose of S.C. Code §§ 29-5-20 and 29-5-40 is the protection of the property owner by limiting his liability and that of his property in respect to all such liens to the *amount due by the owner* on the contract price of the improvement made. Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 93 S.E.2d 855 (1956)(emphasis added).

[14] "[I]n no event shall the aggregate amount of liens set up hereby exceed the amount *due by the owner* on the contract price of the improvement made." S.C. Code Ann. § 29-5-40(emphasis added).

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

finding of a valid debt due Miller from another party is the personal judgment entered against the Bank in conjunction with Miller's mechanic's lien foreclosure claim. As discussed *supra*, this finding was clearly in error. The lower court found no party liable under Miller's Breach of Contract claim or Unjust Enrichment claim[16], so the lower court has failed to properly find that a debt is otherwise due Miller from anyone. Thus, Miller's lien claim must fail based on these most basic aspects of our mechanic's lien law; the lower court's order and findings to the contrary were in error and should be reversed.

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

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

First, in accordance with the following unequivocal directives found in S.C. Code Ann. § 29-5-20, in order for the work allegedly performed by Miller on March 6, 2007 to be 'lienable', it had to have been "authorized by the owner" of each liened tract. S.C. Code Ann. § 29-5-20[17] So, prior to getting into the mechanics of Sections 29-5-90 and 29-5-120, a determination must first be made under Section 29-5-20 regarding whether the owners of the liened tracts authorized Miller to perform its alleged work. Based on Miller's testimony, Miller did not get the consent of the Bank, did not enter into an

[16] Miller didn't even file a claim against Moorhead, despite Miller admitting via sworn testimony at trial that Moorhead was the party that owes Miller the alleged debt. **[Trial Transcript Dec. 8, 2011, p. 97, line 15 thru p. 98, line 3]**

[17] "Every laborer, mechanic, subcontractor, or person furnishing material for the improvement of real estate *when the improvement has been authorized by the owner* has a lien thereon..." S.C. Code Ann. § 29-5-20(emphasis added).

agreement with the Bank, and was not authorized by anyone, to do the purported work on March 6, 2007 on Tract A, as Miller had not had any communication whatsoever with the Bank at that time. **[Trial Transcript Dec. 8, 2011, p. 96, line 20 thru p. 97 line 1]** Likewise, Miller did not get the prior consent of, or enter into an agreement with, Zellner or PSL, and was not authorized by anyone, to do any work on Tract B or The 2 Acre Tract on that date. **[Id.; Zellner Ans.]** In fact, as outlined below, Miller had been instructed by Moorhead in February 2007 to *not* do any more work on the Project because Moorhead's underlying contract with PSL had been mutually terminated. **[Trial Transcript Dec. 8, 2011, p. 80, line 20 thru p. 81, line 16; p. 99, line 16 thru p. 101, line 25; Def.'s Ex. 1, tab 20]**

Ignoring the fundamental failure of Miller to obtain authorization from the owners for the purported March 6, 2007 work (and the lethal effect of same to Miller's lien claim), an analysis of Miller's lien claim under Sections 29-5-90 and 29-5-120 reveals additional grounds for reversal of the lower court's order. In the case of Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 631 S.E.2d 252 (2006), the South Carolina Court of Appeals held:

> In order to perfect and enforce a mechanic's lien, the person asserting the lien (1) must serve upon the owner or person in possession and file with the register of deeds or clerk of court a notice or certificate of lien containing the lien amount, a description of the real property, and other required information 'within ninety days after he ceases to labor on or furnish labor or materials for such building or structure'[18]; (2) must commence a lawsuit seeking to enforce the lien within six months after

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

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

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

> ceasing to provide labor or materials for such real property[19]; and (3) must file a notice of the pending action (lis pendens) within six months after ceasing to provide labor or materials for such real property.

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

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.[20] Butler Contracting at 131, 631 S.E.2d at 257-58. If, however, after substantial completion, trivial services or materials are provided *at the request of the owner, rather than at the initiative of the contractor for*

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[19] 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).

[20] 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).

the purpose of saving a lien, the furnishing of such work or material will extend the commencement of the period for filing a mechanic's lien.[21] Id.(emphasis added).

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

All credible evidence in this case establishes that the lien filed by Miller and the associated foreclosure suit filed by Miller were not timely in accordance with Sections 29-5-90 and 29-5-120. Miller filed its Mechanic's Lien on April 17, 2007 whereby Miller alleges that its last date of work on the Project occurred on March 6, 2007. Miller filed the underlying lawsuit to foreclose its lien on August 31, 2007. The lower court found

[21] "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.

that Craft's last date of work on the Project was on March 6, 2007 and that the filing of Miller's lien and foreclosure Complaint were, thus, timely. **[Craft Order, pp. 3-4]**

Mike Miller was the only witness that testified at trial on behalf of Miller. The only evidence of substance noted by the lower court in its order regarding the issue of whether Miller's lien was timely was what the lower court claimed was the "testimony" of Mike Miller and Kevin Moorhead. **[Miller Order, pp. 3-4]** While the lower court also referenced the testimony of two non-parties concerning their general impression of Mr. Miller's trustworthiness, the lower court provided only the following findings of fact regarding the timeliness of Miller's lien:

> Mike Miller testified on behalf of Miller Construction. ... He testified that his last date performing work on the real property under contract for Moorhead was on March 6, 2007. He specifically recalled this date because he was 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. He recalled being very worried about this issue, and that DHEC would 'take his license' away and fine him a significant amount of money if the pond was not immediately fixed. This type of corrective work is contemplated and called for in his contract. Kevin Moorhead of Moorhead Construction, Inc., also testified that he recalled this incident with DHEC, and was also present at the job site on the same date out of the same concerns voiced by Mr. Miller. ...
> I also find that there was *no testimony* presented that would refute Mr. Miller's testimony as to when Miller's last date of work was on the project. Accordingly, I find by a preponderance of the evidence that Miller's last date of work under contract for Moorhead was March 6, 2007. This would mean that the notice of mechanic's lien was timely filed and served within the ninety (90) days called for by statute. S.C. Code Ann. § 29-5-20[*siq*].

[Miller Order, pp. 3-4 (emphasis added)].

The lower court's 'findings of fact' are not supported by the evidence in the record. And, contrary to the unsupported 'finding' of the lower court that "there was *no testimony presented* that would refute Mike Miller's testimony as to when Miller's last date of work was on the project", extensive testimony and significant evidence was

presented that absolutely refutes Mr. Miller's testimony regarding his alleged March 6, 2007 statutory last date of work.**[Miller Order, p. 4(emphasis supplied)]**. Strikingly, the most compelling of this evidence came in the form of documents generated by, on behalf of or for the benefit of Miller and via testimony provided by Miller. This compelling testimony and evidence makes it clear that Miller's statutory last date of work was well before 90 days prior to April 17, 2007 and well before 6 months prior to August 31, 2007. The evidence makes it plainly obvious that Miller's motives- in unilaterally and gratuitously showing back up on-site after the Bank became the owner, only to perform work on a dissolved contract - was to fabricate its statutory last date of work for purposes of trying to reach the perceived deep pockets of the Bank.

The only credible evidence presented at trial proves that the last date that Miller performed labor sufficient to satisfy the 'last date of work' standards of S.C. Code Ann. § 29–5–20, *et seq.* was prior to November 2006. **[Trial Transcript Dec. 8, 2011, p. 99, lines 13-15]** The actual testimony provided at trial by Mr. Miller regarding its statutory last date of work was unambiguous. Mr. Miller responded with the unmistakable and unequivocal testimony of: "yes" when asked the simple question of whether "[a]ll the work that you're seeking payment for in your mechanic's lien was done *prior to November of 2006*?" **[Id.(emphasis added)]**

As was noted even by the lower court, Miller testified that this work it is seeking payment for under its mechanic's lien was work it performed under its subcontract with Moorhead. **[Trial Transcript Dec. 8, 2011, p. 97, line 2 thru p. 99, line 15]** The testimony and documents produced at trial reveal the undisputed fact that on February 16,

2007[22]- weeks before the purported March 6, 2007 date - Moorhead entered into an agreement with PSL that terminated their contract at which time Moorhead instructed Miller: "[a]s of today, our contract with Pendleton Station has been mutually dissolved. Please cease any and all work being done on this project."[23] **[Trial Transcript Dec. 8, 2011, p. 80, line 1 thru p. 81, line 16; p. 82, lines 2-10; Plaint. Ex. 1, tab 20]**

Further, there was absolutely no evidence produced at trial, including any testimony by anyone, claiming DHEC called or otherwise demanded anyone (including Miller or Moorhead) to come to the Project site during the alleged March 6, 2007 time period. 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]** Neither Mr. Moorhead nor Mr. Miller ever testified that Moorhead 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.; Miller Order, p. 3]** Furthermore, despite the lower court's 'finding' that "Kevin Moorhead of Moorhead Construction, Inc., also testified that he recalled this incident with DHEC, and was also present at the job site on the same date out of the same concerns voiced by Mr. Miller" [24], there is absolutely no testimony in the record that supports this statement. Again, no one was called by DHEC to do this work. And, no one testified to being called by DHEC to do this work. **[Miller**

[22] This February 16, 2007 date was more than 6 months prior to the August 31, 2007 date when Miller filed its foreclosure Complaint.

[23] Miller previously testified under oath in this case that it did not do any more work after it was first notified by Moorhead that the contract between Moorhead and PSL had been terminated. **[Trial Transcript Dec. 8, 2011, p. 101, lines 2-25]**

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

Order, p. 4] Moreover, Kevin Moorhead testified 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]** Miller even testified that he couldn't recall Moorhead or any of Moorhead's staff being present on-site on that alleged date. **[Trial Transcript Dec. 8, 2011, p. 92, lines 2-7]**

Further still, both Mr. Miller and Mr. Moorhead testified that neither of them were on any stormwater permit with DHEC. **[Trial Transcript Dec. 8, 2011, p. 74, lines 1-10; p. 98, lines 21-23]** Based on this fundamental premise, together with the undisputed fact that neither Moorhead or Miller 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.

Miller further testified that the alleged work it gratuitously provided on March 6, 2007 (under the contract that had already been cancelled as of February 16, 2007) was reworking and cleaning out the temporary detention pond on-site. **[Trial Transcript Dec. 8, 2011, p. 91, lines 16-21]** However, the evidence shows that Miller had already performed this work under separate contract in January and February and had already been paid for this work on February 2, 2007 and again on March 8, 2007. **[Trial Transcript Dec. 8, 2011, p. 102, line 1 thru p. 110, line 5; Def.'s Ex. 1, tabs 25-26]** Significantly, Miller presented a lien waiver to *the Bank* on March 13, 2007 (seven days after its alleged last date of work).[25] **[Trial Transcript Dec. 8, 2011, p. 99, lines 13-15; p. 103, line 18 thru p. 104, line 9; Def.'s Ex. 1, tab 26 (emphasis added)]**

[25] The lien waiver provided in no uncertain terms that Miller "certifies and affirms under the penalty of perjury and violation of the Laws of the State in which the Project is located that the materials, labor, services, and all applicable taxes furnished by him prior to the above-mentioned pay period have been paid in full ... and the above named job cannot be made subject to any valid lien or claim by anyone who furnished materials, labor, services and all applicable taxes furnished to the undersigned for use in said job. The undersigned hereby releases and indemnifies the ... the owner from ... liability in connection with all

which led to Moorhead permanently pulling off the Project during this October 2006 timeframe and ultimately to the February 2007 formal, mutual termination of Moorhead's general contract with PSL and the mutual termination of Moorhead's subcontracts with Miller and Craft. **[Trial Transc. Dec. 8, 2011, p. 71, line 2 - p. 77, line 5]**

materials, labor, services, and all applicable taxes furnished by the undersigned through the above-mentioned time period." **[Id.]**

doctrine of merger without any solicitation from the Bank, Miller 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.[32] 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 on the subject of merger 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 on the record by the lower court, its Order not only includes a ruling on the issue of merger[33], it provides a lengthy

[32] 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]**

[33] 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

It is undisputed that the work Miller is seeking payment for under its mechanic's lien was performed in or before October 2006, and that this work was performed under its subcontract with Moorhead. **[Trial Transcript Dec. 8, 2011, p. 97, line 20 thru p. 98, line 3; p. 99, lines 13-15]** It is also undisputed that Miller was notified and instructed by Moorhead on February 16, 2007 that the subcontract was mutually terminated and to cease its work. **[Trial Transcript Dec. 8, 2011, p. 80, line 1 thru p. 81, line 16; p. 82, lines 2-10; Plaint. Ex. 1, tab 20]**

Further still, Moorhead - the party with whom Miller contracted - submitted its last Pay Application to PSL for work completed on the Project by Moorhead and its subs, including Miller, on November 13, 2006. **[Trial Transc. Dec. 8, 2011, p. 80, lines 1-13]** This Pay Application was a request for payment from PSL for work that Moorhead claimed was done on the Project under its contract "thru 10-25-06". **[Trial Transc. Dec. 8, 2011, p. 79, line 3 thru p. 80, line 19; Def. Ex. 1, tab 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 (or for the work of any of its subs) on the Project. **[Id.]** Reasons being: (1) the Pay Applications outstanding at that time represent the only monies allegedly still owing Moorhead and its subs for the work they completed on the Project; and (2) Moorhead became embroiled in a dispute with PSL over change order work, which led to Moorhead permanently pulling off the Project during this October 2006 timeframe and ultimately to the February 2007 formal, mutual termination of Moorhead's general contract with PSL and the mutual termination of Moorhead's subcontracts with Miller and Craft. **[Trial Transc. Dec. 8, 2011, p. 71, line 2 - p. 77, line 5]**

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materials, labor, services, and all applicable taxes furnished by the undersigned through the above-mentioned time period." **[Id.]**

Miller and Moorhead's testimony confirms that the alleged work performed by Miller could in no way be considered furnished as the last item of its contract, as the contract had been terminated long before. Likewise, Miller's testimony (together with Moorhead's) confirms that the alleged last work was not a part of a continuous contract such that the alleged work could otherwise be considered a connected transaction.

In accordance with the Butler Contracting, Wood, et al. cases, there being no question that Miller had substantially completed its work on the subject subcontract in October 2006 (more than 90 days prior to its April 2007 lien date and more than 6 months before its Complaint was filed), an analysis must then be made regarding the type of work alleged to have been performed by Miler on March 6, 2007 to determine: (1) whether it was gratuitous; and (2) whether it was at the request of the owner. Butler Contracting at 131, 631 S.E.2d at 257-58. Based on all of the evidence presented, these questions must be answered in the negative because it remains clear through the testimony of Miller itself that Miller was not instructed by anyone – the Bank, Zellner, PSL (owners of the properties where the work allegedly took place), or anyone else (including even Moorhead) – to do the alleged work. **[Trial Transcript Dec. 8, 2011, pp. 134, line 1 thru p. 135, line 19]** Miller also testified that it did not expect to get paid for the work, that it did not bill for any work on the subject subcontract after October 2006, and that the only money it was owed was for work it performed prior to November 2006. **[Trial Transcript Dec. 8, 2011, pp. 126, line 4 thru p. 133, line 23]** Furthermore, the testimony and evidence makes clear that, throughout this same time, Miller voluntarily chose not to file a claim against Moorhead's Payment Bond despite Miller's knowledge of same. **[Trial Transcript Dec. 8, 2011, pp. 124, line 19 thru p. 125, line 6]**

It is clear in this case that Miller 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 Miller's position, the implied duty of good faith and fair dealing is not recognized here because the contract at issue was mutually terminated long before the alleged work took place and because the (terminated) contract between Miller and Moorhead does not extend to parties such as the Bank, Zellner and PSL who were never parties to that underlying subcontract. **[Trial Transcript Dec. 8, 2011, p. 80, line 1 thru p. 81, line 16; Def. Ex. 1, tab 20]**

The undisputed facts of this matter make it clear that the level of services allegedly performed by Miller 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 Miller was by Miller's own admission gratuitous, as no one asked Miller to perform the work. The courts of this State have made clear that the performance of such gratuitous services will not extend the time for filing the certificate past the date of substantial completion. Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 131, 631 S.E.2d 252, 257-58 (2006). Even if Miller actually did the gratuitous 'work' it alleges, an unreasonable period of time elapsed since substantial completion of the work. And, the work was not provided at the request of any of the owners (or anyone else). And, critically, Miller provided a sworn lien waiver to the Bank after its purported last date of work.

One of the main purposes of the mechanic's lien statutory scheme is "the protection of the owner by preventing his liability on the liens from exceeding the amount owner owes on the contract price." Taylor Cotton and Ridley Inc. v. Okatie Hotel Group, LLC, 372 S.C. 89, 96, 641 S.E.2d 459, 462 (2007). Based on the undisputed facts here, it is abundantly clear that the alleged work was done at the initiative of Miller for the sole purpose of trying to revive its otherwise long expired lien rights in hopes of somehow getting to the perceived deep pockets of the owner, the Bank.[26]

In light of the facts of this matter, the lower court's determinations that Miller's statutory last date of work was March 6, 2007 and that Miller's mechanic's lien and foreclosure suit were both filed in a timely manner were in error and should be reversed.

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

It has been established by the courts of this State that an owner's liability under the mechanic's lien statutes is limited to the balance due by the owner to the prime contractor at the time the owner received notice of the claim. Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 629-630, 93 S.E.2d 855, 860 (1956); Wood v. Hardy, 235 S.C. 131, 138, 110 S.E.2d 157, 160 (1959). Again, this is the case because one of the main purposes of this State's statutory mechanic's lien scheme is "the protection of the owner by preventing his liability on the liens from exceeding the amount

[26] These undisputed facts beg the questions of: why else would Miller, without being asked by anyone and without notifying anyone, return to the Project site to do work on a subcontract many months (more than 90 days) after its last date of work on the contract and even more months after its last receipt of payment on the contract and almost a month after it was notified that the contract was terminated and to cease its work on the Project and at a time when it knew others were still not getting paid on the Project? Why else would Miller not file a claim against Moorhead's payment bond, not file any claim against Moorhead in its Complaint, or merely send a demand letter to Moorhead?

owner owes on the contract price." Lowndes Hill Realty at 629, 93 S.E.2d at 860; Taylor Cotton and Ridley at 96, 641 S.E.2d at 462. This is evidenced by the plain and ordinary meaning[27] of the relevant statutes, S.C. Code Ann. §§ 29-5-10[28], 29-5-20[29], 29-5-40[30], *et seq.* Taylor Cotton and Ridley at 96-97, 641 S.E.2d at 463. In order for the Court to find the Plaintiff's mechanic's lien proper, it must find, in accordance with the plain language of the statute, that a debt is due the Plaintiff, and that debt is due *by the owner* of the liened property.

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

In the case at hand, it is undisputed that Miller filed its lien on April 17, 2007 for work it alleged it provided under the contract it had with Moorhead. It is also undisputed that the Bank became owner of Tract A on March 5, 2007 without notice of Miller's claim- the Bank first received notice of Miller's claim after March 5, 2007. **[Trial Transcript Dec. 8, 2011, p. 92, lines 16-23; Bank's Reply Memo in Support of Motion for SJ pp. 16-19; Affidavit of Kernaghan; Affidavit of Mathias]** In fact, Miller testified at trial to not notifying the Bank until after the March 5, 2007 date of the alleged debt due Miller on the Project. **[Trial Transcript Dec. 8, 2011, p. 92, lines 16-**

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

[28] 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.*

[29] 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).

[30] 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).

23; p. 96, line 20 thru p. 97, line 1] It is also undisputed that at no time, including the time when Miller first notified the Bank of the alleged debt due Miller, has the Bank ever owed any money to Miller for the work Miller alleges to have completed under its lien. **[Id.]** Thus, Miller'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 Miller notified PSL of the amount Miller claimed it was due from Moorhead under its lien (as detailed herein, PSL later deeded The 2 Acre Tract to the Bank). **[Quitclaim Deed]** Due to the relationship between Moorhead and Miller together with the lack of any relationship between Miller and PSL, any amount due by PSL to Miller under such a lien claim would have to arise via the work Miller allegedly performed under the contract between Miller and Moorhead. However, the lower court did not rule in Miller's favor (or Moorhead's favor) regarding the amounts Miller (and Moorhead) alleged to be due by PSL under either of Miller's (or Moorhead's) breach of contract claim or unjust enrichment claim against PSL[31] (instead, entering a personal judgment against the Bank). **[Miller Order; Moorhead Order]** And, Miller did not even file a claim against Moorhead. Therefore, as logic dictates, the Bank's liability (both in rem and in personae, as discussed herein) must also be nil with respect to Miller's lien claim against The 2 Acre Tract, resulting in

[31] Notably, Miller chose not to appeal this decision of the lower court.

Miller's mechanic's lien failing as a matter of law and the lower court's ruling being in error requiring reversal.

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

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

As with The 2 Acre Tract, Tract B was deeded to the Bank by Zellner after Miller's lien was filed. Having found no debt owing by either Zellner or PSL to Miller for any purported work performed by Miller on Tract B, the Bank's liability must also be nil with respect to Miller's lien claim against Tract B, resulting in Miller'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 Miller, in the Mechanic's Lien Foreclosure Cause of Action in its Complaint, seemed to acknowledge this established law as Miller'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]** Miller's mechanic's lien was filed against Tract A in April 2007. Therefore, in light of the unambiguous language found in S.C. Code Ann. § 29-5-70, Miller's lien is not enforceable against the Bank's previously filed mortgages on the property known as Tract A. The lower court's ruling to the contrary was in error and should be reversed.

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

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

Miller testified that prior to March 5, 2007, it never provided notice to the Bank

for the alleged amounts due. **[Trial Transcript Dec. 8, 2011, p. 96, line 20 thru p. 97, line 1]** There is no evidence in the record that the Bank, prior to March 5, 2007 had any notice of the debt Miller 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 Miller's claim *prior* to the deed in lieu of foreclosure. **[Miller Order, p. 6 (emphasis added)]**. Moreover, it is inequitable to declare that the Bank paid nothing of value for Tract A when testimony was provided on behalf of the Bank that it loaned over $5 Million to PSL for the infrastructure improvements (including those performed by Miller) on 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 Miller's subsequently filed mechanic's lien on Tract A. Therefore, the lower court's order finding Miller'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, Miller 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.[32] 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 on the subject of merger 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 on the record by the lower court, its Order not only includes a ruling on the issue of merger[33], it provides a lengthy

[32] 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]**

[33] 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

analysis of what it deems (incorrectly) the controlling law on the doctrine of merger in this State. **[Miller Order, pp. 4-7, 10]** The lower court's order in this regard was in error and should be reversed.

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

The lower court's statements on the record making clear that its prior voluntary commentary regarding merger being mere "dictum" together with the context in which the lower court's retraction occurred indicated to the Bank the lower court's acknowledgement of the well established legal principle that one circuit court judge may not reverse or modify the order of another circuit judge. Binkley v. Burry, 352 S.C. 286, 573 S.E.2d 838 (2002).[34] 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 Miller 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 Miller Order (below) is neither

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merger came via sworn testimony from the Bank. And, such testimony makes it clear, upon applying the correct law, that merger did not apply here.

[34] 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.").

a complete, nor accurate portrayal of the law on merger in this State. **[Miller Order, pp. 4-7]** Rather, as is plainly evident from the chronology of opinions issued throughout the history of this State on merger, the lower court has cited the outdated, 19th Century version of this increasingly irrelevant legal doctrine. The failure of the lower court to not even cite the opinion that has been heralded by more recent courts of this State as both "masterful" and the "leading case in this state on the subject of merger" [35] is as uniquely troubling to the Bank as the opinion offered by the lower court on what the Bank had been led to believe by the lower court on the record as being mere "dictum".

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

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

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

[Miller Order, p. 6 (emphasis added)][36].

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

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

McCraney at 250, 170 S.E. at 279; citing McCreary v. Coggeshall, 74 S.C. 42, 53, S.E.

[36] Throughout this portion of the Miller 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.

978, at 982 (1906)(emphasis added).[37]

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)[38], 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. **[Miller Order, p. 6]** These two sentences cite only that portion of the law promulgated in the outdated 1887 Bleckley case. The lower court failed to cite the immediately following sentence in the First Fed. Case, which, oddly enough, cites McCreary and the very heart of the current merger law: "An intention to prevent merger may be implied from facts indicating merger would be opposed to the interest of the person in whom the legal and equitable interests became united and that such an intention existed at the time of the merger. McCreary v. Coggeshall, 74 S.C. 42, 53 S.E. 978 (1906)." First Fed. at 231, 387 S.E.2d at 254.

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

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

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

that even the lower court described unfavorably on the record as "cement blocks or something there".[39] **[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. **[Bank Lawsuit, pp. 9-10]** 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. **[Bank Lawsuit, pp. 9-10]**

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 constant communication with the attorneys for the Bank. Notably, this written correspondence involved detailed discussions regarding the amounts that PSL still owed the Bank and credits due PSL (against the outstanding debt still owed to the Bank) for the value of the property deeded to the Bank, and the status of PSL's efforts to obtain

[39] 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.]**

independent financing to pay off the remaining debt it still owed the Bank. **[Trial Transcript Dec. 8, 2011, Def.'s Ex. 1, tab 9; 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.[40] 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 by PSL to the Bank at that time.[41]

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

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

[41] 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 Miller had trespassed onto Tract B to perform their alleged work without Zellner's permission. **[Id.]**

this State makes plain that it should be presumed the 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. IN LIGHT OF THE LOWER COURT'S MECHANIC'S LIEN AWARDS TO MOORHEAD AND CRAFT, DID THE LOWER COURT ERR IN NOT APPLYING S.C. CODE §§ 29-5-40 and 29-5-60 IN ORDER TO PROPERLY PRORATE THE AMOUNT IT FOUND OWING TO RESPONDENT?

The lower court awarded the general contractor, Moorhead, the principal amount of $66,627.81 under Moorhead's mechanic's lien claim. **[Moorhead Order, p. 7]** The lower court also awarded Craft, a subcontractor like Miller, the principal amount of $70,000.00 under Craft's mechanic's lien claim. **[Craft Order, p. 8]** Here, the lower court awarded Miller $111,103.13 under its mechanic's lien claim. **[Miller Order, p. 8]**

S.C. Code Ann. § 29-5-40 provides:

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

S.C. Code Ann. § 29-5-40(emphasis added).

> S.C. Code Ann. § 29-5-60 provides:
>
> (A) In the event the amount due the contractor by the owner is insufficient to pay all the lienors acquiring liens as herein provided it is the duty of the owner *to prorate among all just claims the amount due the contractor.*
>
> (B) In the event the amount due a subcontractor by the contractor is insufficient to pay all the lienors acquiring liens under Section 29-5-20 as a result of supplying labor, materials, or services to that subcontractor, *all just liens must be prorated by the contractor among sub-subcontractors and suppliers to that subcontractor.*

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

Again, one of the primary purposes of S.C. Code §§ 29-5-20 and 29-5-40 is the protection of the property owner by limiting his liability and that of his property in respect to all such liens to the *amount due by the owner* on the contract price of the improvement made. Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 93 S.E.2d 855 (1956)(emphasis added).

The total amount awarded by the lower court to Miller and Craft equals $181,103.13. Yet, the total amount awarded by the lower court to their general contractor was $66,627.81. Ignoring for the time being the fundamental issues concerning the propriety of Moorhead, Miller and Craft's lien claims, the cumulative amount awarded to the subcontractors under their mechanic's lien claims is $114,475.32 more than what the lower court awarded to the general contractor under its lien claim on the same Project. Under the plain meaning of S.C. Code Ann. §§ 29-5-40 and 29-5-60, the awards to Craft and Miller were in error. Under the statutory scheme (and, again, ignoring the other errors in the lower court's order regarding the propriety of the lien claims at issue), the lower court's order should have prorated the amounts due Craft and Miller and paid such prorated amounts out of the $66,627.81 awarded to Moorhead. Thus, the proration due Miller is 61.35% ($111,103.13 ÷ $181,103.13=0.6135, or 61.35%) of the amount found

owing under Moorhead's lien claim, or $40,876.61. Therefore, the lower court's order was in error and should be reversed.

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

Miller made clear in the only testimony provided on its behalf that the Bank doesn't owe Miller any money on the contract because Miller never had a contract with the Bank.[42] **[Trial Transcript Dec. 8, 2011, p. 95, line 5 thru p. 98, line 12]** At the conclusion of each cause of action in its Complaint, Miller made a prayer for relief specific to each such cause of action. **[Compl.]** While Miller specifically requested pre-judgment interest in its prayer for relief in both its Breach of Contract and Unjust Enrichment causes of action, Miller 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 South Carolina, pre-judgment interest is only appropriate on liabilities to pay money from the time when, either by agreement of the parties or operation of law, the payment was demandable, if the sum is certain. Id. "Stated another way, prejudgment interest is allowed on a claim of liquidated damages; i.e., the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties." Butler Contracting,

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

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

According to the lower court's Order, the claim against the Bank did not arise until the time when the Bank took title to the property.**[Miller Order, pp. 4-6]** The conditions existing at that time reveal that the Bank had not agreed to any amount owed Miller because the Bank had no notice of Miller's claims at that time.[43] **[Trial Transcript Dec. 8, 2011, p. 96, line 20 thru p. 97, line 1]** In a number of construction-related cases, the courts of this State have denied pre-judgment interest to a builder where the builder failed under its burden at trial to establish a stated account and failed to establish that there was an agreement in place between builder and defendant regarding whether the account is a true statement due at a specific point. T.W. Morton Builders, Inc., v. von Buedingen, 316 S.C. 388, 399, 450 S.E.2d 87, 93 (Ct. App. 1994). In such cases, the defendant vigorously disputed the builder's rights to the amounts purportedly due. Id. "The essential elements of an account stated are (1) that the account is actually stated; and (2) that the parties either expressly or impliedly agreed that it is a true statement and is due to be paid then or at some other specified time."Id.(emphasis added).

As with the above referenced cases, there is nothing in the record before us that would indicate the Bank and Miller ever had an agreement regarding monies purportedly due Miller, such that the damages alleged here cannot be 'liquidated'. In addition, there is nothing in the record before us that proves the payment is demandable of the Bank. Further, the Bank had no knowledge of Miller's claim when it became the record owner

[43] Miler even testified that it didn't have any communication with the Bank prior to the Deed in Lieu. **[Id.]**

of the property, the Bank vigorously disputed Miller's right to the amounts alleged to be due, and Miller did not otherwise prove that the Bank had entered into any agreement with Miller signifying that Miller's statement of account was true and due to be paid at a specified time.[44] In fact, the documents and testimony admitted into evidence at trial show that the underlying contract between Moorhead and Miller was terminated at least a month before the Bank became the owner of the property. Thus, an award of pre-judgment interest against the Bank is improper and should be reversed.

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

In ruling that Miller was the prevailing party in this case, the lower court based its determination on the 1997 maritime case of Seckinger v. Vessel Excalibur, 483 S.E.2d 775, 778, 326, S.C. 382, 388 (Ct. Ap.1997). The Seckinger case is not authoritative on the issue of prevailing party. The controlling law on this issue is the 2005 version (together with the 2001 amendments) of S.C. Code Ann. § 29-5-20, and the provisions found therein defining 'prevailing party'. Lauro v. Visnapu, 351 S.C. 507, 518-519, 570 S.E.2d 551, 557 (2002).[45] 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.

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

[45] "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)." Id.(emphasis added).

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

Here, the lower court rendered judgment in the favor of Miller on its mechanic's lien claim in the amount of $111,103.13. **[Miller Order, p 8]** The amount prayed for by Miller in its un-amended mechanic's lien and un-amended Complaint was $111,784.00. **[Miller Lien]** Based on any of the several reasons outlined herein that make clear that Miller's lien fails as a matter of law (meaning Miller should recover $0 on its lien claim), the Bank should be deemed the prevailing party here under controlling law.

However, assuming *arguendo* that the lower court's ruling regarding Miller's lien rights is deemed proper (and that the lower court's ruling regarding Moorhead's lien rights is also deemed proper[46]), the application of S.C. Code Ann. §§ 29-5-40 and 29-5-60 as discussed *supra*, precludes Miller from recovering more than a prorated amount of the lien amount awarded to Moorhead. S.C. Code Ann. §§ 29-5-40 and 29-5-60. This prorated amount ($40,876.61) equals less than half of Miller's $111,784.00 lien amount (half being $55,892.00). Thus, the Bank should be deemed the prevailing party.

The lawsuit filed by Miller was litigated for over four (4) years. All the while, interest, the Bank's attorney's fees and costs escalated. Throughout the litigation, the

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

amount alleged in Miller'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, Miller did not initiate any discovery, to include noticing any depositions or even serving *any* written discovery. In order to defend against the manufactured claims of the lawsuit, the Bank was forced to serve extensive discovery and notice a number of depositions. Throughout the discovery process, it remained clear that Miller did not have any legal basis for its claims against the Bank personally or against the Bank's interest in the property at issue. Despite the clarity of the facts, Miller never amended its Complaint or its lien nor did Miller otherwise dismiss any of its baseless claims. In his order on the Bank's Motion for Summary Judgment, Judge Maddox recognized the misplaced, over-reaching efforts of Miller by issuing summary judgment in favor of the Bank on Miller's bogus breach of contract claim and on the bogus lien it filed against The 38 Acre Tract.[47] **[Maddox Order]**

Despite the Bank having to litigate this baseless lien claim of Miller over the course of 3.5 years and obtaining a judgment dissolving the lien on The 38 Acre Tract, the lower court did not award the Bank its attorneys' fees and costs under S.C. Code Ann. § 29-5-20. The courts of this State have made clear that a defendant to a mechanic's lien claim has the right to collect attorney fees and costs under the statute when it prevails on such a dispositive motion. Keeney's Metal Roofing, Inc. v. Palmieri, 345 S.C. 550, 554-555, 548 S.E.2d 900, 902-903 (2001). At a minimum, the Bank should have been awarded its attorneys' fees and costs in successfully defending against Miller's wrongful lien as against The 38 Acre Tract. It is illogical and patently unfair for the lower court not

[47] At no time during the time period at issue did PSL contract with anyone, including Miller, 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.]**

to take this liened parcel into account when ruling in favor of Miller when, under the same premise offered by the lower court, it would have had to take it into account if it ruled in favor of the Bank. This very type of inequity to the lien debtor is the reason the Statute was amended in 2001. Moreover, by allowing a lien creditor to hold a 38 acre tract hostage for over 3.5 years without any basis whatsoever for doing so (all the while trying to litigate/leverage its claims against 3 other unrelated properties) is exactly the inequity the legislature of this State was trying to curb when it included the prevailing party provision in the mechanic's lien statute.

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

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

The attorney fee amount of $45,000.00 that was awarded *sua sponte* by the lower court to Miller is more than 40% (forty percent) of the $111,103.13 principal amount awarded to Miller by the lower court. **[Trial Transcript Jan. 24, 2012, p. 27, lines 1-7]** Based on the fact that Miler provided absolutely nothing to the lower court or to the Bank in support of its claim for attorney's fees, it is presumed that the lower court merely awarded the above amount based on a completely arbitrary percentage of recovery. **[Trial Transcript Jan. 24, 2012, pp. 1-30]**

It is undisputed in this case that the basis of any attorney fee amount is statutory- S.C. Code § 29-5-20. The courts of this State have recently found in cases such as this where the State statute includes a prevailing party provision for attorneys' fees that "an award of [attorney's] fees based on a percentage of the prevailing party's recovery is

improper." S.C. Department of Transportation v. Revels, 399 S.C. 423, 428, 731 S.E.2d 897, 899 (Ct.App. 2012). Also, when an award of attorney fees is requested and authorized by statute; the trial court must make specific findings of fact on record as to the nature, extent, and difficulty of services rendered, time and labor devoted to case, professional standing of counsel, contingency of compensation, customary fee charged in locality, and beneficial results obtained, before awarding a specific amount of fees. Collins v. Collins, 239 S.C. 170, 122 S.E.2d 1 (1961).

Here, there were *no* specific findings of fact made on the record as to the elements delineated in Collins, such that there is *no evidence on the record* which could support the specific amount of fees awarded by the lower court. **[Trial Transcript Jan. 24, 2012, pp. 1-30]** In fact, Miller provided *absolutely nothing* to either the lower court or the Bank to evidence the attorney's fees that it allegedly incurred. **[Trial Transcript Jan. 24, 2012, pp. 1-30]** Thus, the lower court's ruling in this regard appears to be completely arbitrary, which is exactly what the courts of this State have found to be wholly improper.

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

prosecuting any of the other causes of action. Id. There were no specific findings of fact made on the record with respect to the amount of Miller's attorney's fees, to include what was actually incurred by Miller, the segregated amount incurred by Miller on just the Mechanic's Lien portion of the lawsuit, or the contractual fee arrangement that counsel for Miller entered into with Miller.[48] **[Trial Transcript Jan. 24, 2012, pp. 1-30]**

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,

April 5, 2013
Greenville, SC

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[48] 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 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-04-2786

Miller Construction Company, LLC ..... Respondent,

v.

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

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

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Appellant's Initial Brief in the above-referenced case has been served on all parties of record by mailing a copy of same in the United States mail, postage prepaid this 5 day of April, 2013, addressed as follows:

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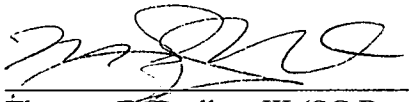

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