THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Knox McMahon

Circuit Judge



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Case No.: 2011-CP-32-01369

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Carolina Refrigeration Services, Inc. — Respondent

v.

Claude L. Leitzsey, Sr., Claude L. Leitzsey, Jr., Lisa M. Leitzsey and Branch Banking and Trust Company — Defendants

of whom

Claude L. Leitzsey, Sr., Claude L. Leitzsey, Jr. and Lisa M. Leitzsey are

Appellants

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# INTIAL BRIEF OF RESPONDENT

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Jean P. Derrick
205 West Main Street
P.O. Box 929
Lexington, SC 29072
Phone: (803) 359-6189
Fax: (803) 808-1657
Attorney for Respondent

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## STATEMENT OF ISSUES ON APPEAL

DID THE TRIAL JUDGE PROPERLY HOLD APPELLANTS IN DEFAULT?

A. Did Appellants fail to provide a satisfactory explanation for their failure to timely answer?

B. Did Appellants fail to show good cause why they should not be held in default?

## STATEMENT OF THE CASE

Respondent Carolina Refrigeration Services, Inc. filed March 31, 2011 a Mechanic's Lien in the amount of $16,100.00 for the heating and cooling system installed in the Spence's Island lake house of Appellants Claude L. Lietzsey, Sr., Claude L. Lietzsey, Jr. and Lisa M. Lietzsey. The three individual Appellants were all personally served, separately, with the Mechanic's Lien and Lis pendens on April 4, 2011 and April 5, 2011. ( ) Respondent filed a Summons and Complaint to foreclose the lien April 6, 2011, and Appellants were again personally and individually served with the Summons and Complaint on April 7, 2011 and April 8, 2011. ( )

On May 17, 2011 Respondent filed an Affidavit of Default, when none of the Appellants answered or otherwise appeared. ( )

Respondent moved for entry of judgment by default on June 28, 2011, which Motion was heard September 8, 2011 by the Honorable R. Knox McMahon. Appellants filed a return to the Motion. Judge McMahon issued an Order November 21, 2011 holding Appellants in default, and granting judgment in the amount of $16,100.00, plus

attorney's fees and costs of $3,179.00.( )

Appellants moved pursuant to Rule 59(e) to amend the judgment. ( ) A hearing on this Motion was held July 18, 2012. Judge McMahon granted in part Appellants' motion by Order filed November 27, 2012, amending the judgment so that it was entered on the subject property and not against Appellants personally, but declining to relieve them from their default. ( )

FACTS

In June 2010, Appellants contracted with Baudo and Associates Home Builders, Inc., to build a residence at 1588 Spence Drive, Lexington, South Carolina, a lake front community located on Spence's Island on Lake Murray, for $475,000.00. The heating and air allowance in the general contract between Appellants and Baudo was $16,925.00. (Exhibit A to Leitzsey Affidavit.) Respondent Carolina Refrigeration Services, Inc. was the subcontractor who installed the heating and cooling system in the home for a single price, with no advance draws, of $16,100.00.

The last draw Baudo received, was December 24, 2012. Problems developed between Baudo and Appellants in the performance of the contract. February 2, 2011 Baudo informed Appellants that he was unable to complete the contract.( )

On February 4, 2011, Appellant Claude Lietzsey, Jr. and Chris Hutnyak, owner of Respondent, spoke regarding the remaining heating

and air work which needed to be done. Appellant requested of Hutnyak that Respondent continue work on the house, which it did, and assured him Respondent would be paid, which it wasn't. (Email and correspondence)

After completion of the project, when Respondent's bill for $16,100.00 remained unpaid, Respondent retained an attorney, and March 24, 2011 wrote Appellants requesting payment. ( ) The Mechanic's Lien and Lis pendens were filed March 31, 2011, and personally served on all three Appellants April 4, 2011 and April 5, 2011. ( ) A Summons and Complaint to foreclose the lien was filed April 6, 2011, and personally served on Appellants April 7, 2011 and April 8, 2011. (Affidavits)

Earlier, on January 28, 2011 Appellants Claude, Jr. and Lisa Lietzsey had met with their attorney Kenneth E. Ormand, Jr. to discuss the foreseeable end of the contract with Baudo, and their completing construction of the home themselves. Appellants were advised about basic mechanic's lien law, and the difference between a notice of mechanic's lien and a complaint for the foreclosure of the lien, as well as the timing involved. Ormand advised them that service upon them of a Summons and Complaint for the foreclosure of the lien was a formal commencement of a civil action and required an answer. (Affidavit of Kenneth Ormand)

When Appellants were served with the Summons and Complaint

April 7, 2011, Appellant Claude Lietzsey, Jr. scanned the lien, Lis pendens, and Summons and Complaint to a flash drive. The scanned PDF file was saved to a portable flash drive, and on April 7, 2011 Appellant attempted to send the pleadings to his attorney from his work place lap top computer. Also, on April 18, 2011, Appellant Leitzsey, Jr. repeated this process with pleadings served upon Appellant Lisa Lietzsey from Grow Electric, (an upaid subcontractor) and attempted to send them to their attorney. In fact, neither transmission was effective.

Appellants did not telephone or email Mr. Ormand to confirm receipt by him of the pleadings. Appellants assumed that the documents were delivered and assumed that Mr. Ormand was answering the complaint on their behalf. (Affidavit of Claude Leitzsey, Jr.) While Appellants communicated several times personally with Mr. Ormand in April and May 2011, they did not inquire about the progress of this case or even ask him if he had received the pleadings. (Ormand Affidavit)

However, on Saturday May 21, 2011 Mr. Ormand received an email from Mr. Lietzsey, Jr. mentioning Grow Electric, with which Mr. Ormand was not familiar. Mr. Leitzsey also informed Mr. Ormand at that same time that the house was completed, and they had moved in. Ormand searched the records of the Clerk of Court in Lexington County regarding the reference to Grow Electric, and found the

Carolina Refrigeration case, and realized their default. However, the Lietzseys were on vacation, and only returned to meet with their attorney June 13, 2011. A late answer was filed June 20, 2011.

Appellants were held in default by Order issued by the Honorable Knox McMahon, filed November 21, 2011. Judge McMahon granted in part Appellants' Motion to Alter or Amend, by Order filed November 27, 2012, but ratified and reaffirmed his earlier holding that Appellants had failed to provide a reasonable explanation for their failure to answer, and denied all other grounds of Appellants' Motion to Alter or Amend. This appeal followed.

## ARGUMENT

**The Trial Judge properly held Appellants in default.**

This court, in review of the trial court's exercise of its sound discretion not to set aside the entry of default, should not reverse, absent a clear showing of an abuse of discretion. Sundown Operating Co., Inc., vs. Intedge, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009); Stark Truss Co. vs. Superior Const. Corp., 360 S.C. 503, 508, 602 S.E.2d 99, 101 (Ct.App.2004). An abuse of discretion occurs when the decision is based upon an error of law or when the order is without evidentiary support. In this case, both the law and facts solidly support Judge McMahon's decision to

hold Appellants in default in failing to timely answer the Summons and Complaint with which each was personally and separately served. The decision of the trial court is well supported by the evidence, and not controlled by any error of law.

The South Carolina Supreme Court in Sundown Operating Company, Inc., vs. Intedge, 383 S.C. 601, 681 S.E.2d 885 (2009) held:

> Rule 55(a) provides that when a party fails to respond to a complaint, the clerk shall record an entry of default. However, Rule 55(c) permits a party to move to set aside the entry of default. The standard for granting relief from an entry of default under Rule 55(c) is mere `good cause.'
>
> This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interest of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. Wham vs. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 449, 501-02 (Ct.App.1989). The trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support in the record for the finding of good cause. Sundown Operating Co. Inc., vs. Intedge, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).

**A. Appellants had no satisfactory explanation for their failure to timely answer.**

The various explanations and excuses given by Appellants in this case are ever-changing, but still insufficient. Initially, Appellants claimed that the size of the attachments sent their lawyer April 7, 2011 and April 18, 2011 must have been too large to be transmitted. (Affidavit of Leitzey; Return) The size of these transmittals were 7.6MB (Respondent's Summons and Complaint, Mechanic's Lien and Lis pendens) and 21MB (Same set of Respondent's pleadings, plus Grow Electric Summons and Complaint). However, Respondent's expert William Boling clearly established in his affidavit that both Appellants' Hotmail account, as well as attorney Ormand's Road Runner server, could easily send and receive attachments of this size. (Boling Affidavit)

Respondent's motion to hold Appellants in default was filed June 28, 2011, and heard, finally, September 8, 2011. Appellants were served with Boling's affidavit September 2, 2011, but made no effort prior to the hearing to establish whether or not there was any evidence regarding any attempt to actually send the emails. Judge McMahon's order subsequently held them in default. It was only then that Appellants actually asked an expert to try to find the unsent emails. (Ryan Brown Affidavit) Appellants then filed a

59(e) Motion December 7, 2011, based upon the Brown affidavit, and argued this additional evidence, but which was certainly new evidence, which could have and should have been initially presented to Judge McMahon at the time of the initial motion for default.

Interestingly, even though Appellants were served with Mr. Boling's initial affidavit September 2, 2011, at 1:55 p.m., in connection with the upcoming September 8, 2011 hearing, the only reply affidavit submitted at that time were that of Kevin J. Kilroy, establishing that Kenneth Ormand did not receive emails from Appellant Lietzsey, Jr., on April 7, 2011 or April 18, 2011. (which Mr. Ormand already says in his affidavit), and a Supplemental Affidavit from Claude Lietzsey, Jr., to the effect that he did not receive any notice of non-delivery, (which he already said in his initial affidavit).

The urgent question one must ask of course is: Was there any evidence of any effort on the part of Lietzsey, Jr., to send the emails of April 7, 2011 or April 18, 2011? The silence was resounding regarding the answer to this question. Based on this logical hole in the evidence, Judge McMahon inferred that "Defendants in fact never transmitted the pleadings to their lawyer", which is a correct statement of fact. Also, Judge McMahon found additionally and alternatively that, because Appellants merely assumed the emails had been received, assumed documents had

been delivered to their lawyer, and assumed their lawyer was answering, but failed to call him or email him to confirm any of the above, Appellants therefore had failed to provide to the court a satisfactory explanation for their default.

After being served with the second affidavit of Ryan Brown, Respondent's attorney requested of Appellants' attorney that Respondent's expert Boling be allowed to inspect both the Ormand computer and the Lietzsey computer. Permission was refused and Respondent filed a Motion to Compel inspection. ( ) Permission was subsequently granted, and Mr. Boling inspected the computers and rendered his opinion that attorney Ormand's exchange server was fully functional and would have received any properly sent emails, and that the failure was caused by Appellant's Hotmail server, which did not make a continuing effort to redeliver the emails, and instead dumped them. (Boling Affidavit June 19, 2012)

At this second hearing, the theme of Appellants' excuses was that the email had been sent, but inexplicably not delivered. In their Statement of Facts, Appellants still concede that their emails were not delivered "for unknown reasons."

In fact, according to Respondent's expert witness, Mr. Boling, the emails were not delivered because Appellants':

> Hotmail server did not make a continuing effort to redeliver Mr. Leitzsey's emails because it was experiencing problems with

> its transport system. When this occurs, email is dumped from the transport system and no further attempts are made to send it. There are no accessible ways to determine the status of an email's path through the Hotmail system...." (Boling Affidavit filed June 19, 2012)

Mr. Boling further relates that Hot mail is:

> "a free mail service that has a long history of issues, particularly related to processing emails with attachments. It does not afford its users with access to normal trouble shooting tools or a support staff that will assist with email issues. There is documented evidence of the issues and several studies have established its unreliability." (Affidavit)

Mr. Boling further opines that the "Hotmail service utilized by Mr. Leitzsey is notoriously unreliable. In using a free email service such as Hotmail that has no guarantee of delivery or mechanisms in place to assist in tracking, making failure of delivery likely." (Affidavit)

Respondent also notes that in their Statement of Facts Appellants claim "several Mechanic's Lien notices and one law suit to foreclose" a lien were earlier "transmitted by Appellants to attorney Ormand by electronic mail". This is in fact not established in either Appellants' affidavit or Mr. Ormand's affidavit. Mr. Ormand's affidavit merely states that he, with reference to the service of the prior litigation, refused to accept service of the pleadings, and instead made arrangements for the

Lietzseys to accept service. (Ormand Affidavit) In other words, Appellants had no track record of successfully transmitting pleadings to their attorney via email, and in fact in this case the two times they tried to do it, failed in the attempt.

There is ample evidence in the record to support the exercise of the circuit judge's sound discretion in holding Appellants in default.

First, it is unreasonable for Appellants to use the free service Hotmail as a method by which to transmit important documents to their attorney. Appellants had already met with their attorney and knew the importance and significance of timely responding to legal process. Both the Mechanic's Lien and Lis pendens, and subsequently the Summons and Complaint were each served on all three individual Appellants, separately. Their attorney had already contacted them in reference to the first Summons and Complaint filed by Big Red Enterprises, Inc., to allow them to personally accept service. All three of these individuals were therefore fully aware of the significance of the ritual of the personal service of the Summons and Complaint and the importance of answering. (Ormand Affidavit)

Yet Appellants used the free email service of Lietzsey, Jr., which "has no guarantee of delivery or mechanisms in place to assist in tracking, making failure of delivery likely." (Boling

Affidavit June 19, 2012) In fact, Appellants' experts themselves echoed Respondent's expert Boling statements that "Hotmail [is]....a free email service that has a long history of issues, particularly related to processing emails with attachments." (Boling Affidavit) For example, Appellants initial expert, Kevin J. Kilroy, opined:

> It is very possible that E-mails with attachments such as those sent to Mr. Ormand would have been undeliverable and that neither notice of attempted delivery would have been given to the intended recipient nor notice of delivery failure would have been given to the sender. I have seen this many times in my work with E-mail systems. In my experience, problems with any E-mail system are common, and despite popular belief, E-mail is not totally reliable. (Kilroy Affidavit September 8, 2011)

Appellants second expert, Ryan Brown, in his initial affidavit of December 7, 2011 opined:

> There are multiple reasons why the emails may not have been delivered to the `in box' on Mr. Ormand's computer. Non-delivery of email is a fact of electronic mail and the possible explanations are speculative but not necessarily anyone's fault.

Mr. Brown in his second affidavit of July 12, 2012 states "Email is a fact of business and commercial life around the world and there are sometimes problems with Email that are not

necessarily anyone's fault."

Appellants had to be aware of the unreliability of sending a Hotmail with attachments when they did so.

However, that is not their only unexcusable behavior. Probably more significant is Appellants' failure to confirm delivery of the emails. Even though the Hotmail service itself provides no way to "guarantee delivery" (by receipt acknowledged), there were repeated opportunities for Appellants to pick up the phone and call their lawyer, or even email their lawyer, to confirm with him that he received the pleadings. However, Appellant Lietzsey, Jr., admits in his affidavit:

> 12. In March 2011, we were served with a Notice of Mechanic's Lien by Carolina Refrigeration Services and on April 7, 2011 were served with a Summons and Complaint from that company.
> 13. On receipt of these items, we converted these documents into a PDF electronic file and sent them to Attorney Ormand on April 7, 2011 as an attachment to an email from our personal Microsoft Hot Mail account. This electronic file was huge containing more than 20MB of data and apparently was under-deliverable to Mr. Ormand because of its size. A copy of the transmittal to Mr. Ormand is attached as Exhibit D though the attachment has been deleted from this copy. *We did not telephone Mr. Ormand to confirm receipt by him of the material and we did not receive any notification from our email provider that the email and attachment were not delivered to him. We assumed that the documents were delivered and we assumed Mr. Ormand was answering the complaint on our behalf*

*and Claude Lietzsey,Sr. (Italics added)*

Not only did Appellants fail to initiate any specific communication with their attorney about the Carolina Refrigeration pleadings, when they in fact did communicate with their attorney after they had been served, they still failed to question him about receipt of the pleadings. As their attorney states in his affidavit, "During the months of March and April I had occasional communication with the Leitzseys and several other notices of Mechanic's Liens were filed, but I was not aware of any other actions commencing foreclosure of any lien."

This silence and inaction on the party of Appellants, to confirm receipt or even question their lawyer when they did communicate with him about other matters, is especially damning, when one considers that even in the April 7, 2011 E-mail of transmittal, Appellant Lietzsey, Jr., had questioned Mr. Ormand about the failure of Respondent to join the general contractor as a party. The cover email from Appellants to Ormand on April 7, 2011, never sent, states:

> Ken, attached are 3 documents received on behalf of Carolina Refrigeration Services, Inc., from Jean P. Derrick. The Mechanic's Lien and Lis pendens were received together on April 1st, (filed on 3/31/11). The Civil Action-Summons was delivered to us on 4/7/11 (filed on 4/6/11). From Mechanic's Lien to Summons in 7 days.... I noticed that Steve Baudo and Associates is not listed as a defendant....? Invoices enclosed are

to Baudo and Associates Home Builders, Inc.
Thanks Claude Lietzsey.
(803)403-4626
Lisa Leitzsey
(803)403-4627

Because Appellants had been communicating with Mr. Ormand since January 2011 about their problems, and because he had given them extensive advice and answered all of their questions, Appellants should have known it was uncharacteristic of Mr. Ormand to be asked a question, and not to respond. However, Appellants didn't worry about confirming Mr. Ormand had received the pleadings. Instead, they went on vacation. Appellants ignored the advice of their attorney about the importance of responding promptly to a Summons and Complaint. Appellants failed to learn from the significance of their own attorney refusing to accept initial service of the Big Red Enterprises' Summons and Complaint, and instead requiring them to do so. Appellants utilized an admittedly defective method to forward the pleadings to their lawyer, and then for 29 days failed to follow up with a phone call, and failed to ask the lawyer about them when they had did have direct contact with him. Appellants can offer no satisfactory explanation for the default.

As Judge McMahon stated in his Order Granting Default Judgment: "In this case, there is substantial, uncontroverted evidence that it is the negligence of the Defendants themselves and their disregard of the importance of legal process, that has led to

their default."

In granting Appellants 59(e) Motion in part, by clarifying that judgment was entered only against the property, and not them individually, Judge McMahon pointed out that:

> Sundown recognizes that a party must first prove a reasonable explanation for their failure to answer before Court proceeds to consider the three-factor analysis first set forth in Wham vs. Shearson Lehman Bros., 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct.App.1989).
> In particular, the November, 2011 Order cited to the example set in Williams vs. Vanvolkenburg, 312 S.C. 373, 440 S.E.2d 408 (Ct.App.1994), in which the Court noted that whether defendants failed to ask their attorney to file an answer, or whether the attorney was negligent in failing to answer was irrelevant--the defendants failed to demonstrate good cause by setting forth any other valid reason why they had failed to answer the Complaint. In the present case, through the Defendants' own admission via filed Affidavit, the Defendants made it clear that they merely assumed their transmittal of the court documents was effected, while also admitting that they failed to exercise reasonable diligence in ascertaining whether or not their transmission was successful. The court finds a satisfactory explanation by the Defendants for their default to be absent. (Order filed November 27, 2012)

On appeal, Appellants complain vaguely that somehow the circuit court here:

> used a standard that is even more stringent than that required by Rule 60(b). The standard he used creates a wall that even the most diligent litigant who makes an honest mistake cannot scale. Assuming for the sake of analysis that the Appellants were wrong in not verifying receipt by their attorney of the pleadings, this error by them is not equivalent to a lawyer, insurance company or corporate executive ignoring a legal pleading. The Appellants are lay people who were justifying in relying on the form of communication that had proven reliable. At the worst, their conduct was simple mistake as contemplated by Rule 60(b) SCRCP. (Brief)

However, even the single case cited by Appellants in support of their position that they have shown a reasonable excuse for failure to answer instead highlights Appellants' unreasonableness and failure to act with customary diligence. In Ricks vs. Weinrauch, 293 S.C. 372, 360 S.E.2d 535 (Ct.App.1987), Mrs. Ricks was served with a summons and complaint. Upon service, she called her attorney and was advised to contact her insurance company. She contacted her insurance agent by phone, and hand-delivered a copy of the pleadings to the agent, along with a letter requesting he deliver the pleadings to the carrier. She then went on vacation, and upon her return, discovered that her insurance agent had closed his office and declared bankruptcy. The pleadings were in her car trunk, and her car was in the garage for service, and she was unsuccessful in obtaining the pleadings to file a timely answer.

However, the Court of Appeals affirmed the trial court's vacating the entry of default for good cause. Simply put, the conduct of Mrs. Ricks shows she respected the importance of the legal process. She sought legal advice, hand-delivered pleadings to her insurance agent with a cover letter of instructions, *and followed up later with the insurance agent*. It was this customary diligence, in checking on this legal matter important to her, that revealed the problem and is a satisfactory explanation for her failure to timely answer.

Here, although Appellants had sought legal advice and had received good advice about the importance of legal process, they failed to take it seriously and spend the time and make efforts to insure they had effectively communicated with their own attorneys. Instead, Appellant Leitzsey, Jr. cavalierly noted to his attorney in the unsent email: "From Mechanic's Lien to Summons in 7 days...." (email)

Appellants utilized an unreliable method of communication (a free email service with no method of tracking or receipt verification, known to dump when there were attachments), and failed to follow up with any inquiries of their attorney, and when they did have contact with their attorney, failed to ask him about these pleadings. They didn't call their lawyer before they left town for vacation. Their conduct is behavior similar to the

depressed corporate president's failure to act in Stark Truss Company vs. Superior Construction Corporation, 360 S.C. 503, 602 S.E.2d 99 (Ct.App.2004), or the failure of the insurance agent to send the pleadings on to the insurance company, in Richardson vs. PV, Inc., 383 S.C. 610, 682 S.E.2d 263 (2009). As Judge McMahon noted, it doesn't matter whether the attorney failed to answer, or whether the homeowners failed to ask the attorney to answer--either way, good cause to vacate entry of default is not shown. Williams vs. Vanvolkenburg, 312 S.C. 373, 440 S.E.2d 408 (Ct.App.1994).

Appellants argue that they should not be "held to same high standards as the professionals in the cases cited by the Court. They should be held to a much lesser standard for determining reasonable conduct." (Appellants' Brief) Respondent submits that there is no double or higher standard employed by the circuit court here. Instead, the court in the sound exercise of its discretion, determined that Appellants did not effectively transmit the pleadings to their lawyer, nor diligently follow up to confirm receipt. This is just the same good common sense standard of conduct that Mrs. Ricks showed, and for which she was not held in default. Mrs. Ricks did not rely on assumptions, nor should Appellants be allowed to do so.

A recent and relevant opinion from the Court of Appeals is Regions Bank vs. Owens, 402 S.C. 642, 741 S.E.2d 51 (Ct.App.2013).

There the Court of Appeals affirmed the lower courts refusal to set aside the entry of default of one of the mortgagors, who asserted that he thought that a co-defendant would be answering on his behalf. The master-in-equity found that this mistaken belief, that someone else would answer the Complaint on his behalf, did not meet the "good cause standard set forth in Rule 55(c), SCRCP." The master further found that the defaulting Defendant failed to take steps to protect himself and should not be rewarded for his "own negligence and intentional ignorance."

The Court of Appeals affirmed, and held that this defendant failed to put forth a satisfactory explanation of the default, noting that his co-defendant disputed that he had told him that he would "take care of it." Also, the court held:

> Furthermore, Owens presented no evidence he took any steps to protect himself by contacting either Paddy or Paddy's attorney to confirm an answer would be filed on his behalf. See Hill vs. Dotts, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct.App.2001)(Holding "*a party has a duty to monitor the progress of his case. Lack of familiarity with legal process is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney.*") 402 S.C. at 643-644, 741 S.E.2d at 54-55 (Italics added)

Here, Appellants are not being held to a higher standard, and nor should they be held to a lesser standard. Appellants should be expected to confirm the receipt of such an important set of

pleadings, sent by so risky a method as a Hotmail email with an attachment.

There is no clear abuse of discretion here. The facts and the law compelling point to the substantial justice of holding Appellants in default.

**B. Appellants failed to show good cause why they should not be held in default.**

Appellants also in their brief quote at length from an order issued by another circuit judge in another case. (Appellant's Brief) An unpublished opinion from another trial court is not authority in this case. The facts in that case, upon review of the order, appear to be different. Just one Appellant, and not all three were in default, and apparently even then that Appellant had not been properly initially served. (By Certified mail but not by restricted delivery. See SCRCP Rule 4(d)(8)). It is unknown but doubtful whether the record before this other circuit judge contained the detailed evidence set forth in two Boling affidavits, for example. Certainly, it is improper to "pit" two judges against each other.

Appellants in their brief also make a parade of horribles: That email is used pervasively in our society, and that Appellants should be able to rely on Hotmail just as they could the U.S. Postal Service. This analogy is not accurate. A free Hotmail

service upon which Appellants nevertheless relied to transmit these very important documents to their attorney is without the safeguards that all other servers and web based email services offer--a way to track the process of the email at the point of initiation, and verify its receipt. Nevertheless, if Appellants had utilized a reliable email server with these safeguards, there would not have been a default.

Nor does an analysis of the Wham factors give any comfort to Appellants.

Appellants filed their late answer 76 days after being served with the Summons and Complaint, at least 44 days out of time.

Also, there is no meritorious defense.

Appellants were aware by February 4, 2011 that Respondent was owed $16,100.00, and that the job wasn't quite finished. There was a phone call on that date between Chris Hutnyak owner of Respondent, and Appellant Claude Lietzsey, Jr., in which Hutnyak, calling at Leitzsey's request, was assured that if he finished the job he would be paid. (July 13, 2011 correspondence with attached email and form letters) There were ample funds remaining on the contract at that time to pay this just debt, (Leitzsey Affidavit) and Appellants were given timely notice of this debt. § 29-5-60 should not be a defense.

This is not a situation of an innocent homeowner paying twice

for the same work. Respondent simply seeks to be paid one time, by Appellants, who have benefitted from its good workmanship, labor and materials.

Also, Appellants make much of cost over-runs on the job. However, Respondent's bill for the fine heating and air-conditioning system it installed in Appellants' lake front home on Spence's Island was only $16,100.00, approximately $800.00 less than the allowance for heating and air in the general contract. ( ) Respondent has not caused any cost over-runs, and its bill should be paid. Appellants' problems with cost over-runs on the contract are of no concern to nor any fault of Repondent's.

Also, Appellants assert that Respondent's Mechanic's Lien was defective, for allegedly failing to comply with § 29-5-15, South Carolina Code of Laws, which statute states that "a contractor must provide the county clerk of court or register of deeds proof that he is licensed or registered if he is required by law to be licensed or registered." Respondent filed his license June 28, 2011. ( ) The rule in this State is that "Mechanic's Lien statutes, being remedial, are to be given a liberal construction." Clo-Car Trucking Company, Inc. vs. Clifflure, 282 S.C. 573, 576, 320 S.E.2d 51, 53 (Ct.App.1984). Respondent has complied with the statute.

## CONCLUSION

This is a classic Mechanic's Lien foreclosure case. Respondent did the work, ultimately at Appellants request, with their assurances of payment. Appellants are hoist on their petard--their cavalier disregard and indifference to the subcontractors working on their house spilled over to influence how Appellants handled the legal processes initiated by those subcontractors. Appellants indifference and disregard of the importance of the legal process in this case should not serve as an excuse to vacate their default. The Circuit Court Order, based on the evidence and the law, should be affirmed. This matter should be remanded to the Circuit Court, which has referred it to the Master-In-Equity, for a hearing to determine the present amounts owed for principle, interest, and attorney's fees, including fees incurred on appeal.

Jean P. Derrick
205 West Main Street
P.O. Box 929
Lexington, SC 29072
Phone: (803) 359-6189
Fax: (803) 808-1657
Attorney for Respondent

June 24, 2013