THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2012-CP-36-00090
Appellate Case No. 2014-002540

Terlizzi Home Improvement, LLC,..... Appellant,

v.

Michael L. Boheler, Jeannette A. Boheler,
and the Palmetto Bank as Assignee of Midlands
Mortgage Corp.,.....Defendants,

Of Whom
Michael L. Boheler and Jeannette A. Boheler are the.....Respondents,

v.

William Terlizzi,.....Third-Party Defendant and Appellant.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

This case raises the issue of whether an individual is liable for his intentional torts, acting under the guise of a Limited Liability Company ("LLC"). The issues on appeal are:

I. Did the trial judge properly vacate the mechanic's lien even though it was reduced?

II. Did trial judge properly award attorney's fees against William Terlizzi personally?

III. Did the trial judge award a reasonable amount of attorney's fees?

STATEMENT OF THE CASE

THI is an LLC formed and operating under the laws of the State of South Carolina. *See* (R. pp. 35-41). William Terlizzi ("Terlizzi") is the president of THI, the sole member of THI, and acts individually as THI's qualifying licensed residential home builder. *See* (R. pp. 64-74).

Michael L. Boheler and Jeannette A. Boheler ("the Bohelers") are retired, and after working hard throughout their lifetime, in 2010 they set out to build a home on family land they owned.[1] THI and Terlizzi (together "Appellants"), through Terlizzi's partner, John Harding ("Harding") contracted with the Bohelers to construct a home ("Home") in Newberry County, South Carolina, for a fixed price of $225,000.[2] *See* (R.

[1] Jeannette Boheler is severely handicapped, and the Bohelers' intent was to construct a home with handicapped access and other amenities that would allow Jeannette to live comfortably with her disabilities. (R. p. 104, lines 7-10).

[2] Although the contract causes of action are not at issue in this appeal, Respondents assert that Appellants have conflated the two distinct issues of contract and mechanic's lien in their Brief. Appellants' assertion that the $225,000 Contract was "never intended to be binding" is misleading at best. Appellants have never raised the issue of validity of the contract. To the contrary, Appellants alleged in their very Complaint that the contract was binding, and subsequently, Terlizzi swore in his Affidavit in Support of Mechanic's

pp. 76-85; R. p. 516, lines 19-20).

The relationship between Harding and THI is one of the issues in this case.[3] It is undisputed that Terlizzi and Harding acted as partners to construct the Boheler home. Their arrangement was that Harding would be the "job contact person" who was in charge of the day-to-day construction, while Terlizzi was in charge of handling the money. In return, each would receive half of the profits of the construction contract. (R. p. 235, line 9-p. 236, line 2; p. 247, lines 3-15; p. 512, lines 5-8). Harding had the authority to make all decisions on behalf of THI, including changing the plans, entering into contract changes, and interpreting the intent of the agreement on behalf of THI. (R. p. 253, lines 14-24). Additionally, Harding had the authorization to do whatever he felt he needed to do on this job. (R. p. 235, lines 22-24). The trial judge held that "[a]lthough Terlizzi attempts to deny the existence of a partnership with Harding, there is no dispute that they were, in fact, partners under South Carolina law." (R. pp. 14-16). This finding was not appealed by Appellants.

In September 2010, prior to the beginning of construction of the Bohelers's Home ("Home"), a final set of plans was developed and approved by Harding and Terlizzi. Terlizzi admitted that Harding presented the finalized plans to him and told him of Harding's agreement with the Bohelers to construct the Home for the same $225,000 as agreed upon before, and Terlizzi acquiesced. (R. pp. 317-23). Terlizzi recounted in his deposition,

---

Lien that he relied on the written contract amount for the formation of the Initial Lien. *See* (R. pp. 39-40); see also (R. p. 443).

[3] Terlizzi and his counsel describe the relationship in several different ways: "independent contractor" (plaintiff's supplemental responses to defendants' interrogatories); "a friend" (R. p. 231, line 21-p. 232, line 20); "on again, off again relationship" (R. p. 215, lines 6-7).

> Q: You knew that it was [Harding's] intent to build the house according to the second set of plans and still charge $225,000?
> A: Yes, sir.
> . . . .
> Q: Okay. So now the agreement is to build the second set of plans for $225,000 - - isn't it?
> A: Correct.

(R. p. 318, lines 1-4; p. 323, lines 1-5). The second, final set of plans included most, if not all, of the items Terlizzi would later claim as extras and changes to the plans and which would form the basis for THI's initial lien. (R. pp. 325-26; p. 295 lines 13-15).

Pursuant to the Contract, the Bohelers paid directly to Harding a deposit of $22,500.00 to begin construction of the Home. Terlizzi admits that Harding told him that Terlizzi had accepted the money and used it to start construction. (R. pp. 227-28). It was agreed upon that because the construction loan was for the exact amount of the contract, money would be returned to the Bohelers through the last draw upon completion of construction, as is common in most construction loan deals. (R. p. 446; p. 518, line 24-p.519, line 4). Harding understood that any change orders or extras above and beyond the fixed price in the Contract would have to be in writing and signed by the Bohelers and either Harding or Terlizzi. (R. p. 447; p. 530).).

Over the course of the construction job on the Home, THI accepted draws from the Bohelers's construction loan in the amount of $190,875.00. (R. p. 68). Each time THI received a draw, Terlizzi signed a lien waiver in favor of the Bohelers stating that there were no monies due for any material or labor on the Home. *See* (R. pp. 364-98); see also (R. pp. 285-307).

During the first eight months of the construction, the only contact the Bohelers had was with Harding. (R. pp. 229-33). Over time, the Bohelers grew frustrated with the

slow progress of the construction. The Bohelers demanded Terlizzi take a larger role in the construction once the construction had stalled in May 2011. (R. p. 229). Up until May 2011, Terlizzi had let Harding control all aspects of the job, and Terlizzi had not supervised the project or even been to the Home until then. (R. p. 233).

When Terlizzi took over the construction of the Home, he told the Bohelers that the home could be completed according to the September 2010 plans with the money left in the construction loan. (R. pp. 322-24). Terlizzi was aware that Harding had promised to construct the Home in accordance with the September plans and that Harding had promised the Bohelers even more for the $225,000. (R. pp. 317-18). Sometime after, Terlizzi realized he would need more money than what was left in the construction loan because there was a great amount of work left to be done and work that would need to be repaired or reworked. Terlizzi threatened to walk off the job. (R. pp. 310-12).

The Bohelers reluctantly agreed to potentially forego their recoupment of the $22,500.00 deposit they would have recovered from the construction loan at the end of construction in order to keep THI on the job, and this agreement was contingent upon THI finishing the construction job by August 24, 2011.[4] Appellants walked off of the job on August 23, 2011 without completing the Home. (R. pp. 311-16).

After walking off the job, Terlizzi approached Harding to tell him of his plans to file a large mechanic's lien large enough that the Bohelers would not be able to complete the house and would be forced to negotiate a settlement with Terlizzi. (R. p. 531). Terlizzi attempted to coerce Harding into conspiring against the Bohelers by filing a lien so large that "it would place the Boheler[]s over a barrel." *Id.* Terlizzi believed that the

[4] This date was chosen because it was the date the construction loan expired.

Bohelers had invested their life savings in the Home and could not afford a new contractor to finish the Home or a lawyer to defend them from the improper lien. *Id.* Terlizzi explained to Harding that if they could claim enough extras and change orders,[5] the Bohelers would not be able to pay off a lien, construction would stop, and the Bohelers would be forced to negotiate with THI. *Id.*

Harding refused to be compliant with Terlizzi's plan and told Terlizzi that there were no extras or charges that THI could charge against the Bohelers. (R. p. 531). Harding told Terlizzi that any changes made on the Home were a result of Harding's interpretation of THI's obligations under the Contract and not as a result of any request of the Bohelers. *Id.*

At the time THI ceased work on the Home, the Bohelers had paid directly to THI and Harding $221,067.73 of the $225,000.00 contract price, and the Home was not substantially completed.

On September 6, 2011, THI filed a mechanic's lien covering real property ("Property") owned by the Bohelers. (R. pp. 27-28). In its lien, THI alleged that it was owed $106,001.13 for "materials furnished and/or labor performed or furnished, **and actually used** in the erection, alteration or repair of buildings or structure situated on [the Property] . . . with the knowledge and consent of the [Bohelers's] . . . ." Mechanic's Lien (hereinafter referred to as "the Initial Lien") (emphasis added). In the Initial Lien's accompanying Statement of Account and Affidavit in Support of Mechanic's Lien, Terlizzi personally attested, as owner of THI, that the basis for the lien was $27,570.00 in "extra cost due to changed plans", $44,306.13 in "extras and add-ons requested by

[5] No change orders were ever signed or authorized by the Bohelers, as required by the Contract.

owners", as well as $34,125.00 owed from the original contract amount. (R. pp. 29-30).

On its face, the Initial Lien appeared to be overstated and based upon contractual arguments rather than actual costs of material and labor used on the Boheler home. As a result, the Bohelers immediately questioned its accuracy. On September 9, 2011, September 14, 2011, and January 5, 2012, the Bohelers, through counsel, requested for THI to conduct an accounting and reduce the Initial Lien to the value of THI's actual material and labor but Terlizzi refused. *See* (R. pp. 505-08; pp. 532-34).

The bank that gave the Bohelers the construction loan halted the flow of money and threatened to foreclose the construction loan. (R. p. 262, lines 6-14). Ultimately, the Bohelers were forced to empty their savings, liquidate their 401k plans, draw Social Security earlier than planned, and take out a loan in order to come up with the $141,300.00 (the amount of the Initial Lien plus 33%) necessary to have THI's lien released from the Property pursuant to S.C. Code Ann. § 29-5-110. (R. pp. 104-05).

On February 21, 2012, THI filed suit to foreclose on the Initial Lien. *See* (R. pp. 35-41). On March 23, 2012, the Bohelers filed an Answer and Counterclaim and Third Party Claims against THI and Terlizzi. *See* (R. pp. 42-63). In their Answer, Counterclaim and Third-Party Complaint, the Bohelers asked the trial judge to award attorney's fees and costs in favor of the Bohelers. *Id.*

Terlizzi's deposition was taken on October 11, 2012. During his deposition Terlizzi admitted several things: (1) That the amount in material and labor he could account for in terms of a lien was only $48,719.23 (an amount which does not give credit for the $22,500 down payment made by the Bohelers) (R. p.308, lines 17-22); (2) He did not use actual costs of material and labor, instead he estimated what he would have

charged for the alleged extras and changes if there had been proper change orders; (R. p.267, lines 14-22; p.284, line 21-p. 285, line 7); (3) He signed lien waivers for much of the work that was listed in the Initial Lien as "extras and changes in plans" (R. p. 142, lines 5-16); (4) He had added overhead and profit to the Initial Lien. (R. p. 283, lines 9-11).

On September 23, 2013, THI filed a Stipulation of Reduced Lien Amount, lowering the amount of the Lien from $106,001.13 to $48,864.23. (R. p. 86). This "New Lien" was not based upon the extras, change orders and contract amount which formed the basis of the Initial Lien. Instead this new amount mirrored the amount that Terlizzi admitted was owed after performing an actual accounting of the material and labor used on the job; something that the Bohelers had begged him to do more than 2 years before. (R. pp. 505-08).

On January 13, 2014, the Bohelers filed a Motion for Partial Summary Judgment, where they sought dismissal of THI's mechanic's lien foreclosure action. (R. pp. 87-88). On March 10, 2014, the Bohelers filed a memorandum in support of the Motion for Partial Summary Judgment, in which the Bohelers asked the trial judge to require THI to reimburse the Bohelers for attorney's fees and costs and also asked the trial judge to grant the Bohelers such other and further relief as the court may deem proper. (R. pp. 478-98).

On March 12, 2014, THI, Terlizzi, and the Bohelers appeared before the Honorable Frank R. Addy, Jr., Circuit Court Judge for Newberry County ("trial judge"). At the hearing, the trial judge stated,

> I want to look at [Terlizzi's] deposition and see straight from the horse's mouth how he came by these figures. If it turns out that the method he used to calculate this was wholly unsupported in the law, I think that's sufficient to

> demonstrate knowingly and willfully, especially since the error was brought to [THI's] attention at the time the initial lien was filed.

(R. p. 141, lines 8-14). Upon conclusion of the hearing, Bohelers's counsel submitted an Attorney's Fees Affidavit. The trial judge issued an order granting the Bohelers's motion and discharging the Lien. (R. pp. 14-16).

On April 23, 2014, the Bohelers sent a letter to the trial judge asking for the attorney fees award to be granted as to both THI and Terlizzi, individually. (R. pp. 503-04). Subsequently, Terlizzi requested a hearing on the issues of attorney's fees and costs and Terlizzi's personal liability. (R. p. 509). On May 8, 2014, the trial judge held a hearing on (1) the amount of attorney's fees and costs to be awarded, and (2) the propriety of ordering Terlizzi to be personally responsible for the fees and costs. (R. pp. 145-90). On May 22, 2014, the Bohelers submitted an amended affidavit of attorney's fees. (R. pp. 460-472). The trial judge entered its final Order granting the Bohelers's Motion for Summary Judgment, dismissing the mechanic's lien, and granting an attorney's fees award in favor of the Boheler's and against both THI and Terlizzi personally. (R. pp. 17-24).

On July 10, 2014, THI and Terlizzi filed a Motion to Reconsider raising all of the issues now on appeal. (R. pp. 89-92). The trial judge granted THI and Terlizzi's request for oral argument, and on October 16, 2014, the court held a hearing on the Motion to Reconsider. (R. pp. 191-224). On October 17, 2014, the trial judge entered an Order denying the Motion to Reconsider. (R. pp. 25-26).

STANDARD OF REVIEW

On appeal from the grant of a summary judgment motion, this court applies the

same standard as that required for the circuit court under Rule 56(c), SCRCP. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). "Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Adamson v. Richland Cnty. Sch. Dist. One*, 332 S.C. 121, 124, 503 S.E.2d 752, 753 (Ct. App. 1998) (quoting *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997)).

ARGUMENT

I. The trial judge properly granted summary judgment and vacated THI's mechanic's lien because the judge found Terlizzi had willfully and knowingly claimed more than was due pursuant to S.C. Code Ann. § 29-5-100.

A mechanic's lien exists only by virtue of statute, and one's right to a mechanic's lien is wholly dependent upon the language of the statute creating it. *Clo-Car Trucking Co., Inc. v. Clifflure Estates of S. Carolina, Inc.*, 282 S.C. 573, 575, 320 S.E.2d 51, 53 (Ct. App. 1984). The basis for a mechanic's lien is a debt due "for labor performed or furnished or for materials furnished and **actually used** in the erection, alteration, or repair of a building or structure upon real estate...." S.C. Code Ann. § 29-5-10 (emphasis added). The prevailing party may recover the costs which may arise in enforcing or defending against a mechanic's lien, including attorney's fees. *Id.*

In addition to the strict rules required to file a valid lien, the mechanic's lien statutes provide for four instances in which a mechanic's lien may be discharged, one of which is by showing that the filer of the lien has willfully and knowingly claimed more than is due in the statement of the amount due for labor and materials pursuant to S.C. Code Ann. § 29-5-100. *Sea Pines Co. v. Kiawah Island Co., Inc.*, 268 S.C. 153, 156, 232 S.E.2d 501, 502 (1977). Additionally, the South Carolina Supreme Court has held that

the Court has "inherent powers to afford relief where the deprivation imposed by a wrongfully filed mechanic's lien cannot be corrected by the statutory methods." *Id.* at 157, 232 S.E.2d at 502.

The trial judge, after considering all the testimony and reading the depositions of Terlizzi and Michael Boheler properly held "Terlizzi clearly violated [§] 29-5-100 in that he wil[l]fully and knowingly overstated the sum due in filing the lien." The trial judge stated that he found no rational basis for how Terlizzi came up with the initial Lien amount. The trial judge expounded,

> The court notes that it does not take this action lightly. Had Terlizzi's initial lien had some basis in fact, had Terlizzi not included in the lien amount work for which lien waivers had already been executed, had Terlizzi not admitted to "reverse engineering" the sums [in the initial lien], had some modicum of care been exercised by Terlizzi, or had direct evidence of an effort to put the Bohelers "over a barrel" not existed, the court's order might be different. By filing a lien completely lacking in accuracy and of specious validity, Terlizzi caused the Bohelers to suffer significant financial hardship in terms of raising the money so that they could bond off the lien. In short, the facts are undisputed, and this case represents one of those (fortunately) rare cases where summary judgment is warranted due to the willful and wanton conduct of [Terlizzi].

(R. pp. 14-16).

A. Issues not properly raised by Appellants.

Appellants devote a large part of their Brief to discussing contract issues which are not relevant to a mechanic's lien dispute or not properly at issue before this Court. Appellants attempt to muddy the waters by discussing various contract issues which have no bearing on the calculation of the Initial Lien which required only a simple accounting of the amount of material and labor that Appellants had expended on the Boheler

property.

Under South Carolina Law, overhead and profit are generally not proper components of a mechanic's lien. The only exception to this rule is in the limited situation where the terms of overhead and profit are agreed upon by the parties and are subsequently embodied within a contract. *Zepsa Construction, Inc. v. Randazzo*, 357 S.C. 32, 38, 591 S.E.2d 29, 32 (Ct. App. 2004). Appellants attempt to argue that this case falls within this exception.[6] However, neither the Construction contract nor any other document cited by Appellants specifically spells out the terms of the overhead and profit as envisioned by *Zepsa*. In fact, it was not until Appellants responded to discovery that the amount or method of calculating overhead and profit was disclosed. In addition, as Mr. Terlizzi did not use his actual costs in calculating his initial lien amount, this arbitrary overhead and profit was added to an already fictitious and arbitrary cost figure.

In their Brief Appellants raise a dispute as to the enforceability of the lien waivers signed by Mr. Terlizzi. This issue is not properly before this Court. *Wilder Corp v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998) (An issue may not be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review). Appellants did not raise this issue in response to the Motion for Partial Summary Judgment. Respondents further assert that Appellants have presented no evidence or testimony that the lien waivers were ever in dispute. Even if the validity of the lien waivers had been raised and ruled upon, there would still be no dispute or controversy. The testimony of Terlizzi is clear that he believes the lien waivers to be

[6] Respondents note that Appellants cite in their Brief the withdrawn predecessor of this case, *Zepsa Construction, Inc., v. Randazzo*, 356 S.C. 39, 586 S.E.2d 599 (Ct. App. 2003).

valid.

Bohelers's Counsel:	[I]s there any reason why you believe the lien waivers that you signed are not valid?
Terlizzi:	No, sir.

(R. p. 299, lines 2-5).

B. Defects in a fraudulently filed mechanic's lien may not be cured by an amendment or subsequently filed lien.

Appellants argue that the trial judge erred in dismissing the New Lien because the Initial Lien no longer existed at time of defendants' motion to dismiss and that § 29-5-100 does not support a dismissal in this instance because the amount was reduced by the filing of the New Lien. Following Appellants' logic a contractor who files an inflated and fraudulently filed mechanic's lien may hold the property owner hostage to that lien until such time that the contractor deems it proper to reduce the lien to a more valid number.

The South Carolina mechanic's lien statute is very specific regarding the timing of filing a lien. A lien must be filed within 90 days of the last day that materials or labor were provided by the contractor. Although the basis of the New Lien is completely different than the basis for the Initial Lien, Appellants understand it is necessary for them to relate back to the filing date of the Initial Lien since the statutory date by which a lien must be filed had long since run at the filing of the New Lien. Therefore, they attempt to avoid this nuance by calling it a "reduced lien." Yet, at the same time, they attempt to distance themselves from the infirmities of the Initial Lien by stating that the Initial Lien "no longer existed" at the time of the filing of the summary judgment motion. (Appellants' Brief, p. 4)

The trial judge found the New Lien to be "a drastic deviation from the original lien amount", not a mere accounting error. (R. p. 20). Respondents contend that if the Initial Lien no longer existed, as Appellants assert, then the New Lien was invalid, as the New Lien was filed in violation of the requirements of § 29-5-120, having been filed after the 90-day-period. On the other hand, if Appellants assert that the New Lien was an amended, reduced lien of the Initial Lien, then the New Lien must be saddled with the same infirmaries as the Initial Lien, which would have needed to be valid when filed in order to be maintained. For the same reasons as was determined by the trial judge, Respondents assert that the Initial Lien was clearly not valid when filed. Accordingly, the New Lien must fail, as it should either: (1) be saddled with the same infirmities of bad faith as the Initial Lien; or (2) be deemed to have been filed after the time for filing had run.

1. Mechanic's liens are not consent orders.

Appellants argue that the trial judge and Respondents did not find the New Lien objectionable and accepted the returned money. Respondents assert they were not consulted before the New Lien was filed, nor did Respondents consent to the amended lien amount. Respondents have not waived any rights as a result of the filing of the New Lien. Respondents have never "consented" to the New Lien, as Appellants contend.

2. A mechanic's lien is not a pleading.

Appellants argue that § 29-5-180 provides for the amendment of mechanics liens and Rule 15(c) provides that amendments relate back to the original date of filing. Section 29-5-180 allows for amendments of pleadings when the contractor chooses to enforce the lien by petition to the court pursuant to § 29-5-140 rather than normal civil

proceedings. It is a directive to the courts to treat those proceedings in a similar fashion as normal civil actions. Appellants' action is not sought pursuant to § 29-5-140 and, instead, is proceeding as a normal civil action. As such, § 29-5-180 has no relevance to this action, which instead is governed by the South Carolina Rules of Civil Procedure.

Mechanic's liens, by their nature, provide notice of the contractor's alleged interest in the property and are valid for a period of up to six months without the filing of any pleadings whatsoever. They need not be filed with the clerk of court but may instead be filed with the register of deeds office. S.C. Code Ann. S.C. Code Ann. § 29-5-15. They are therefore not pleadings subject to the amendment Rules of Civil Procedure. They are creatures of statute, subject to strict filing deadlines and requirements.

Appellants would hold that a contractor could bypass those deadlines and requirements simply by amending his lien at any time. Such a holding would not only diminish the purpose and intent of the statutory requirements, but would also allow a contractor freedom to place a lien of any size regardless of its validity and hold the property owner hostage, knowing he could always amend that lien later with no consequences. At the hearing on the motion to reconsider, the trial judge stated to Appellants' counsel:

> I'm a little worried about the practical effect of what you're suggesting. There's case law out there under the mechanic's lien statute that presupposes that dismissal of a lien outright could be done if it's shown that there was bad faith on behalf of the contractor. And that's the case law that this court is relying on. If what you're saying is correct and a plaintiff contractor can file a lien and then reduce it, what's to prevent the exact situation that we have in this case from reoccurring. I can see an honest mistake. I can see, okay, well, I transposed some digits, and instead of $100,500, it's $100,900 or something. I can see allowing modification. I don't think that the courts would

> have any problem with that. I don't think that the Defendants in this case would have had any problem with that. But if you establish a lien or file a lien to the tune of $100,000 and then voluntarily reduce it years later, after the Defendants had to bond [it off], deal with the lis pendens, all that other good stuff, and defeat the Defendants' argument that, hey, judge, the entire lien should be dismissed because of their bad faith in the inception – at the inception of the lien, there would be no way – you would simply encourage a plaintiff, from a public policy standpoint, to file a lien of a million dollars, even though all they can prove would be $25,000 because they're always at liberty [to reduce], once they're called on . . . to knock it down to [$25,000] and not suffer any consequences. I'm a little concerned about the public policy of what you're advocating.

(R. p. 211, line 7 – p. 212, line 9).

Additionally, the trial judge found in his order granting summary judgment:

> Terlizzi has made no *prima facie* showing for filing the lien, nor does the amount owed depend on which of the party's allegations is to be believed. No factual basis existed for [] Terlizzi filing a mechanics lien in the sum of $106,001.13. [Terlizzi] claims to have made a "good faith estimation (sic)" in arriving at this figure . . . however, there is nothing to support the numbers he used in filing the lien. The initial lien amount is properly characterized as "a guess." Furthermore, two (2) years after filing the lien [Terlizzi] has now stipulated the lien to $48,719.23, a figure which arguably accounts for the outstanding work and labor actually put into the home . . . [but] [t]his reduced amount is a drastic deviation from the original lien amount and evidences a wil[l]ful disregard for *any* care in calculating the initial lien amount.
>
> Simply stated, this Court cannot find, and [] Terlizzi cannot offer, any rational basis which could conceivably make the initial $106,001.13 lien even arguably valid. **The fact that a new lien amount has been stipulated to does not affect the validity, or lack thereof, of the original lien amount.**

(R. pp. 19-20) (emphasis added).

3. An Order entered during a pre-litigation stage does not constitute law

of the case.

Whether another trial judge denied a motion to dismiss in the pre-litigation and pre-discovery phase of the case is inconsequential to a subsequent order. In fact, the trial judge in this case called the initial motion "perfunctory."[7] (R. p. 212, line 25). However, Appellants argue that the Lien was found to be *prima facie* valid after Respondents' first motion to dismiss under § 29-5-100 was denied, and, because of that earlier ruling, Appellants did not have reason enough to reduce the Lien.

The Bohelers filed a pre-litigation motion in order to force an accounting of the Lien amount, because the Bohelers were desperate to find a way to avoid losing their family property and the home that was not yet completely built to a foreclosure action. In the pre-litigation motion filed by the Bohelers, THI actually defended the motion by asserting (1) the court had no jurisdiction because no suit had been filed and (2) the motion was akin to a summary judgment motion, and there had been no discovery at that point, so the motion was premature. (R. pp. 33-34). The Court never made any type of finding that the Initial Lien was valid, but simply agreed that the motion was premature and denied the relief sought.

C. The trial judge found there was no genuine issue of material fact and thus, the Order granting summary judgment was based on sound evidentiary standards.

When reviewing the grant of a summary judgment motion, the Court of Appeals applies the same standard of review as the trial court. *Brockbank*, 341 S.C. at 372, 534 S.E.2d at 692. "Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Adamson*,

[7] "[T]hat's akin to a magistrate establishing probable cause in a criminal hearing. It doesn't take a whole heck of a lot." (October 16 transcript, page 23, lines 5-7).

332 S.C. at 124, 503 S.E.2d at 753. The trial judge properly applied this standard, as there was no fact in dispute that would have altered the finding that Appellants had violated § 22-5-100. Appellants argue that the trial judge erred in finding that the existence of some evidence satisfies the requirements of Rule 56, SCRCP. Specifically, Appellants assert that they contested Harding's Affidavit, wherein Harding states that Terlizzi approached Harding with the idea of placing a lien on the Property so large that they would have the Bohelers "over a barrel." (Appellants' Brief pp. 6-7). Not surprisingly, Appellants point to no testimony, evidence or affidavits which oppose or recant the testimony of John Harding. This is because no such testimony or evidence was ever presented. Instead Appellants point to a footnote within the Order in which the Court pointed out that it was not relying solely upon the affidavit in reaching its conclusion. (R. p. 19). The Judge properly found that there were no facts in controversy, and the footnote was only there to state that even if the affidavit were disputed (which it was not) and not considered by the Court, Plaintiff's knowingly incorrect calculation alone was sufficient to show that the lien was improperly filed.

Additionally, the trial judge found there was "no rational basis" for how Terlizzi came up with the amount of the original Lien. See Rule 56, SCRCP.

Appellants' reliance on the speculative nature of the trial Judge's footnote is misplaced. A discussion of gross negligence is irrelevant, as ultimately the trial judge determined that Terlizzi's conduct was intentional, willful and tortious.

D. The trial judge found there were no evidentiary disputes.

Appellants argue that the factual scenario surrounding the construction of the Home was "so uncertain and muddy" that it should have precluded summary judgment;

however, the trial judge found there was no issue of material fact, and Appellants have not asserted any specific evidentiary issues which were in dispute. The trial judge found, "the facts are undisputed, and this case represents one of those (fortunately) rare cases where summary judgment is warranted due to the willful and wanton conduct of [Terlizzi]." (R. p. 20). The trial judge went on to find,

> Mechanics liens serve the laudable goal of protecting contractors who, in good faith, personally incur obligations for material and labor and are subsequently unfairly denied payment. However, the law does not permit those protections to be extended to contractors who insist upon filing liens which are wholly unsupported, the result of mere guesswork, or which are intended to create and improper collateral advantage over the owners. This court will not countenance an effort by an individual to pervert legitimate legal process into an effort to extort obscene sums which are excessively more than could arguably be due.

(R. pp. 20-21).

II. The trial judge properly awarded attorney's fees against Terlizzi personally because the South Carolina Uniform LLC Act does not absolve a member of liability for his intentional acts.

Appellants argue that the trial judge erred in awarding attorney's fees against Terlizzi personally. The main thrust of Appellants' argument is that THI, not Terlizzi himself, was a party to the mechanic's lien action and that the LLC protects him from personal liability for the award of attorney's fees. Appellants further argue that the Bohelers have no right to recover attorney's fees from Terlizzi personally because such relief was not requested in the pleadings.

Only a contractor holding a valid license with the state may file a mechanic's lien in South Carolina. S.C. Code Ann. § 29-5-15. The law further provides that where a party defending against a lien prevails, that party is entitled to recover the costs and

expenses which may arise in defending against the lien, including a reasonable attorney's fee. S.C. Code Ann. §§ 29-5-10, 29-5-20. Mere accounting inaccuracies will not invalidate a lien, but where "it appear that the **person** filing the certificate has wilfully and knowingly claimed more than is his due," the lien is invalid. S.C. Code Ann. § 29-5-100 (emphasis added). In this instance the person swearing to the accuracy of the accounting is the individual license holder, Terlizzi. Thus, it is clear that the statute was created with the intention and anticipation that this penalty would apply to Terlizzi personally.

The trial judge found that Terlizzi willfully and knowingly violated the mechanic's lien statute by claiming more than he was due. *See* (R. p. 20). Furthermore, Terlizzi was also aware that this intentional violation may subject him to the award of attorney's fees and costs. *See* (R. p. 21). The trial judge found that "[t]he only reasonable inference from the evidence is that Terlizzi signed the affidavit and statement of account knowing he was not entitled to the amounts he sought." *See* (R. p. 22). Because these actions were not taken in Terlizzi's ordinary course of ownership of the Plaintiff entity, the trial judge held that the actions were *ultra vires* for which Terlizzi could be held personally liable. *See* (R. p. 22). The judge concluded that these intentional acts were of the same nature as the acts for which the Uniform Limited Liability Company Act offers no protection, finding that Terlizzi should not be able to use his LLC to shield himself from personal liability for his intentional conduct and knowing violation of law. *See* (R. pp. 22-23).

A. A member of an LLC cannot shield himself from personal liability for his intentional acts.

The South Carolina Uniform Limited Liability Company Act does not insulate a

member from personal liability for his own tortious conduct or intentional acts. S.C. Code Ann. § 33-44-303(a). Appellants' assertion that Terlizzi may avail himself of the protections of his LLC for his own intentional conduct is misguided and contrary to the overwhelming authority on the issue. As the trial judge found, Terlizzi's actions were not "actions taken in the ordinary course of his ownership of [THI], nor [were] they merely negligent." *See* (R. p. 22). The judge properly considered Terlizzi's acts to be *ultra vires*, subjecting him to personal liability. *Id.*

Contrary to Appellants' claim, the trial judge's finding of personal liability against Terlizzi is not without support. Rather, both the black letter law and public policy support the trial judge's conclusions. The Uniform Limited Liability Company Act states that members of an LLC are not liable for debts, obligations, or liabilities of the company "*solely by reason* of being or acting as a member or manager." S.C. Code Ann. § 33-44-303(a)(emphasis added). The Act envisions protecting members from personal liability for debts incurred by the LLC and from the actions of other members. Nowhere does the Act expressly or impliedly relieve members from any and all personal liability. In fact, the Supreme Court addressed this issue in *16 Jade Street, LLC v. R. Design Const. Co.*, 398 S.C. 338, 728 S.E.2d 448 (2012), *withdrawn*, 405 S.C. 384, 747 S.E.2d 770 (2013). Though withdrawn for other reasons and no longer precedent, the same logic the court applied in *Jade Street* in finding that an LLC does not shield a member from all personal liability by mere virtue of his membership still stands. *See id.* at 345-49, 728 S.E.2d at 451-54. Furthermore, in the case at hand, Terlizzi's intentional and willful misconduct goes well beyond the issue of personal liability for negligence discussed in *Jade Street*. Any suggestion by Appellants that the findings in *Jade Street I or II* —or any other South

Carolina case law—stand for the proposition that an LLC protects a member from personal liability for his intentional misdeeds is misplaced.

The comment to S.C. Code Ann. § 33-44-303 explains: "A member or manager is responsible for acts or omissions to the extent those acts or omissions would be actionable in contract or tort against the member or manager if that person were acting in an individual capacity." Thus, where a member acts in a manner outside the ordinary course of his ownership, as the trial judge found and as the record fully supports Terlizzi did, the member subjects himself to personal liability.

The law has been consistently applied in a similar manner in the corporate context, where the general rule does not protect individuals from liability for torts in which they participated or directed. *See Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 209, 687 S.E.2d 714, 720 (Ct. App. 2009); *see also BPS, Inc. v. Worthy*, 362 S.C. 319, 327, 608 S.E.2d 155, 160 (Ct. App. 2005). The Court of Appeals explained the limits of liability protection in the corporate context in *BPS, Inc.*, stating that "directors not parties to a wrongful act on the part of other directors are not liable therefor[e]," but, if "a director or officer commits or participates in the commission of a tort, whether or not it is also by or for the corporation, he is liable to third persons injured thereby...." 362 S.C. at 327, 608 S.E.2d at 160. Absent express legislative intent to the contrary, an LLC should not offer protections against personal liability where a corporation does not. *See* 51 Am. Jur. 2d *Limited Liability Companies* § 16 (2015) ("For liability purposes, a limited liability company . . . should be subject to the same treatment as a corporation.").

As the trial judge noted, the overwhelming majority of other jurisdictions ruling

on the matter have found that an LLC's protections do not extend so far as to insulate a member from personal liability for his own personal misconduct. *See, e.g.*, *People v. Pacific Landmark*, 129 Cal. App. 4th 1203, 29 Cal. Rptr. 3d 193 (Cal. Ct. App. 2005); *Weber v. U.S. Sterling Securities, Inc.*, 282 Conn. 722, 924 A.2d 816 (Conn. 2007); *Argentum Intern., LLC v. Woods*, 280 Ga. App. 440, 634 S.E.2d 195 (Ga. Ct. App. 2006); *Regions Bank v. Ark-La-Tex Water Gardens, L.L.C.*, 997 So. 2d 734 (La. Ct. App. 2008), writ denied, 5 So. 3d 119 (La. 2009); *Allen v. Dackman*, 413 Md. 132, 991 A.2d 1216 (2010); *White v. Collins Bldg., Inc.*, 704 S.E.2d 307 (N.C. Ct. App. 2011); *277 Mott Street LLC v. Fountainhead Const., LLC*, 83 A.D.3d 541, 922 N.Y.S.2d 299 (N.Y. App. Div. 2011). To hold otherwise would allow a member to use an LLC "as a shield for personal liability for his own intentional acts." *See* (R. p. 22).

Thus, Appellants' argument that the trial judge had no legal basis to hold Terlizzi personally liable for attorney's fees based on his intentional acts is meritless. To the contrary, the trial judge's holdings are supported by ample case law and scholarly opinion. Moreover, the trial judge expressly noted that not all actions taken by Terlizzi on behalf of the LLC would render him personally liable. The trial judge made a clear distinction between acts for which an LLC affords protection from personal liability and the intentional, willful misconduct that is not protected. (R. p. 23, footnote 3, "Clearly, not all actions taken by Terlizzi on behalf of the LLC would render Terlizzi personally liable.").

Moreover, the trial judge's finding of personal liability is supported by this Court's interpretation of the legislative intent behind the attorney's fee provision of the mechanic's lien statute, which affords property owners a remedy "where a mechanic

attempts to enforce a defective or wrongful mechanic's lien." *Utilities Const. Co., Inc. v. Wilson*, 321 S.C. 244, 248, 468 S.E.2d 1, 3 (Ct. App. 1996) (citing *Cedar Creek Properties v. Cantelou Assocs., Inc.*, 320 S.C. 483, 465 S.E.2d 774 (Ct. App. 1995)) ("clearly, the intent of the Legislature in allowing the prevailing party in an action brought under the mechanic's lien statute to recover attorney fees and costs stems from a desire to deter both wrongful filing of liens and unjustified refusal to pay debts subject to mechanic's liens"). In sum, Terlizzi personally filed the mechanic's lien using his own contractor's license, and the statute's intent is to deter contractors from filing such wrongful liens. Furthermore, LLC's are not intended to protect members from personal liability from their wrongful acts. Therefore, the trial judge properly found Terlizzi liable for attorney's fees.

B. Appellants had notice that Terlizzi may be held personally liable for attorney's fees and costs resulting from Respondents' successful defense against the mechanics' lien and suffered no prejudice in the award.

Terlizzi had ample notice of the issue of personal liability for attorney's fees and suffered no prejudice in the award. Appellants' contention that the award of attorney's fees is improper because the relief was not requested in the Bohelers' pleadings is misguided. The Court of Appeals addressed this issue in *Utilities Const. Co., supra*. In that case, a property owner prevailed in defending against a lien filed by a contractor and sought the statutory award of attorney's fees. The contractor contended that the trial court erred in awarding attorney's fees to the property owner because the property owner did not request the fees in her answer, thus barring recovery. *Id.* at 247, 468 S.E.2d at 2. The Court of Appeals rejected the argument, finding "no prejudice to [the contractor] because it had notice of the potential for an award of attorney fees given the mandatory

language of the mechanic's lien statutes." *Id.*

In the case at hand, Terlizzi knew or should have known that he was subjecting himself to personal liability upon filing a defective, wrongful mechanic's lien, as the statute expressly states. The statute contemplates the license-holder filing the lien being subject to an award of attorney's fees if he does not prevail in the action. See S.C. Code Ann. § 29-5-20. Terlizzi, as the license-holder, personally signed and filed the lien. In addition, this issue was specifically raised by Terlizzi and argued before the trial judge on two separate occasions. (R. pp. 145-90; R. pp. 191-224). The prejudice envisioned by the rule requiring the pleadings to request attorney's fees is "a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Pool v. Pool*, 329 S.C. 324, 328, 494 S.E.2d 820, 823 (1998). Lastly this issue was raised by counsel for the Bohelers before Appellants filed their action. In several communications, counsel requested that Terlizzi perform and accounting. At one point counsel wrote:

> That is why I indicated that I expected your client to reduce the lien amount to reflect a more accurate accounting of what he is owed rather than to insist on its removal. If he does that the Bohelers will bond off the lien and the parties can let the courts decide who owes what to whom. But Mr.Terlizzi knows that he is not entitled to $106,000 on this home and has willfully and intentionally claimed more than he is due. This is in violation of the Mechanics Lien Statute and may subject him to attorneys fees and costs. If he is unwilling to reduce it then so be it. He has been given the opportunity to do so.

(September 14, 2011 e-mail from Charles Krawczyk to Robert Cook).

Here, as the record demonstrates, Terlizzi cannot claim lack of notice or opportunity to refute the issue. Terlizzi was not prejudiced by the judge's findings, and the award should be affirmed.

C. Summary judgment on this issue is appropriate because no further inquiry into the facts is necessary to clarify the application of the law.

Appellants attempt to avoid summary judgment on the issue of attorney's fees by claiming the finding of Terlizzi's personal liability is a novel issue of law. This is not a novel issue; as discussed above, South Carolina law makes clear that "[t]he mere fact that a case involves a novel issue does not render summary judgment inappropriate." *Linog v. Yampolsky*, 376 S.C. 182, 185-86, 656 S.E.2d 355, 357 (2008). Where further inquiry into the facts is not needed to clarify the application of the law, a mere issue of novel impression does not preclude summary judgment. *Shadwell v. Craigie*, 361 S.C. 492, 605 S.E.2d 567 (Ct. App. 2004) (citing *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 320 S.C. 143, 153, 463 S.E.2d 618, 624 (Ct. App. 1995), *aff'd in part, rev'd in part on other grounds*, 327 S.C. 238, 489 S.E.2d 470 (1997)).

In the case at hand, the facts underlying the trial judge's conclusions are undisputed. Only one inference can be drawn from these undisputed facts—and that is Terlizzi willfully and knowingly violated the mechanic's lien statute by claiming an amount to which he was not entitled. Thus, a trial is not necessary to further develop the record in this case. Moreover, Appellants fail to identify how a trial would clarify the application of law. This is a case of a member's intentional, willful, and "egregious conduct", which extend well beyond the limits of an LLC's sphere of protection. (R. p. 23). Thus, the trial judge properly held Terlizzi personally liable for his *ultra vires* acts.

III. The trial judge awarded a reasonable amount of attorney's fees

Appellants argue the fees and costs awarded by the trial judge in the amount of $31,611.75 were excessive. Appellants also argue certain fees should have been deducted from the fee award, including fees related to work performed on the original

motion to dismiss, fees incurred while conferencing, fees incurred updating the file and pleadings, and fees incurred for legal research. Appellants assert that an attorney hourly rate of $275.00 was excessive and that the attorney hourly rate and the paralegal and law clerk hourly rate of $125 were not established as the prevailing rate in the locality.

S.C. Code Ann. § 29-5-20(a) states, "[i]f the party defending against the lien prevails, the defending party must be awarded costs of the action and a reasonable attorney's fee as determined by the court." Ordinarily, the award of attorney fees lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *See Kiriakides v. School Dist. of Greenville County*, 382 S.C. 8, 675 S.E.2d 439 (2009).

At the May 8, 2014 hearing, the issue of whether the attorney's fees included in the Attorney's Fees Affidavit were reasonable was argued before the trial judge. During the hearing, Appellants' counsel cross-examined the Bohelers' counsel regarding specific line-item entries on his Attorney's Fees Affidavit. (R. pp. 145-90).

Upon conclusion of the hearing, the Bohelers' counsel submitted an amended Attorney's Fees Affidavit.[8] The trial judge issued an Order on July 7, 2014, finding the Bohelers were the prevailing party under S.C. Code Ann. § 29-5-20(a) and the Amended Attorney's Fees Affidavit met factors necessary to determine reasonable attorney's fees as set out in Rule 407, SCACR, and a now unpublished Court of Appeals opinion,[9] as

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[8] The purpose of submitting an Amended Attorney's Fees Affidavit was to clarify issues raised by Appellants in the May 8, 2014 hearing and to deduct fees that were raised as potential issues in that hearing.

[9] The South Carolina Supreme Court depublished *The Spriggs Group, P.C. v. Slivka*, Appellate Case No. 2011-204366 on March 18, 2015. At the time the trial judge relied on the Court of Appeals opinion in his order granting summary judgment, the factors included in the published Court of Appeals opinion to determine reasonableness of

well as finding that the fees and costs were proper and necessary under S.C. Code Ann. § 29-5-20(a). *See* (R. pp. 17-24).

The reasonableness of the attorney's fees and costs lie within the sound discretion of the trial judge, pursuant to *Kiriakides*. The trial judge clearly weighed the factors required in *Seabrook Island Property Owners' Ass'n v. Berger*, 365 S.C. 234, 616 S.E.2d 431 (Ct. App. 2005), and found the fees to be reasonable before awarding them to the Bohelers. Although Appellants argue that attorney's fees in the amount of $275 are too steep, Appellants have not asserted any evidence that $275 per hour for a partner, or that $125 per hour for a paralegal or law clerk, at a law firm in Columbia, South Carolina is higher than the customary legal fee for similar services. Moreover, counsel for the Bohelers made multiple attempts to draw Appellants' counsel's attention to the blatant and intentional errors in Appellants' Lien amount. If Terlizzi would have conducted a simple accounting at the outset of litigation, two years' worth of litigation costs would not have been incurred. The Bohelers' counsel communicated his concerns regarding the Lien amount as early as September 14, 2011, and thereafter on several occasions, the Bohelers asked Terlizzi to perform an accounting and reduce the Lien to an accurate amount so the proper Lien amount could be bonded off and the parties could then litigate their differences. *See* (September 14, 2011 email from Charles Krawczyk to Robert Cook). However, for more than two years, Terlizzi refused to do so, but, instead, chose to hold the Bohelers over a barrel. Accordingly, attorney's fees and costs in the amount

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attorney's fees were: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." These factors were also used to determine the reasonableness of attorney's fees in *Seabrook Island Property Owners' Ass'n v. Berger*, 365 S.C. 234, 616 S.E.2d 431 (Ct. App. 2005).

of $31,611.75 were properly awarded by the trial judge in this case.

CONCLUSION

The Court should hold that the trial judge properly granted summary judgment and vacated THI's mechanic's lien because the judge found Terlizzi had willfully and knowingly claimed more than was due pursuant to S.C. Code Ann. § 29-5-100.

The Court should also hold that the trial judge properly awarded attorney's fees against Terlizzi personally because the South Carolina Uniform LLC Act does not absolve a member of liability for his intentional acts.

The Court should also hold that the trial judge awarded a reasonable amount of attorney's fees after considering appropriate factors.

For these reasons, the Court should affirm the trial judge's order.

Respectfully submitted,

November 24, 2015

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2012-CP-36-00090
Appellate Case No. 2014-002540

Terlizzi Home Improvement, LLC,..... Appellant,

v.

Michael L. Boheler, Jeannette A. Boheler,
and Palmetto Bank as Assignee of Midlands
Mortgage Corp.,.....Defendants,

Of Whom
Michael L. Boheler and Jeannette A. Boheler are.....Respondents,

v.

William Terlizzi,.....Third-Party Defendant and Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below, she served counsel for the Appellants with a copy of the Final Brief of Respondents by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

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November 24, 2015
Columbia, South Carolina

Tammy Pearson