

22223

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

22228

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.

RECORD ON APPEAL (Vol. 1)

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011LN3600634

Terlizzi Home Improvement Llc	Michael L Boheler Palmetto Bank	Jeannette A Boheler Midlands Mortgage Corp
PLAINTIFF(S)	DEFENDANT(S)	

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

FILED
 NEWBERRY COUNTY
 2011 NOV 22 A 9:29
 JACQUE S. BOWERS
 CLERK OF COURT

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court:

Motion to dismiss mechanic's lien is denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**


Circuit Court Judge

2154

Judge Code

11-21-11

Date

For Clerk of Court Office Use Only

This judgment was entered on November 22, 2011, and a copy mailed first class or placed in the appropriate attorney's box on November 22, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Robert Merrell Cook II Kennedy Law Firm, LLC P.O. Box
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ATTORNEY(S) FOR THE DEFENDANT(S)

S/Jackie S. Bowers

Jackie S Bowers - Clerk of Court**Court Reporter**

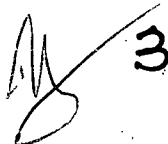
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF NEWBERRY	)	CIVIL ACTION NO. 2012-CP-36-00090
Terlizzi Home Improvement, LLC,	)	
Plaintiff,	)	
vs.	)	ORDER DENYING PLAINTIFF'S AND
Michael L. Boheler, Jeannette A. Boheler,	)	THIRD PARTY DEFENDANT'S MOTION
and The Palmetto Bank as Assignee of	)	FOR SUMMARY JUDGMENT
Midlands Mortgage Corp.,	)	
vs.	)	
William Terlizzi	)	
Defendants.	)	

FILED
NEWBERRY COUNTY
2013 JUL 2 PM 12:30
JACKIE S. BOWERS
CLERK OF COURT

I. INTRODUCTION

Plaintiff Terlizzi Home Improvement, LLC (hereinafter "THI") and Third Party Defendant, William Terlizzi (hereinafter "Terlizzi") have moved for summary judgment on the Bohelers' claims of breach of contract accompanied by a fraudulent act; intentional infliction of emotional distress/outrage; interference with a contractual relationship; unfair trade practice act violation; conversion; and abuse of process. THI and Terlizzi argue that there is no genuine issue of material fact and that these parties are entitled to judgment as a matter of law pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. With the exception of the cause of action for interference with a contractual relationship which has been voluntarily withdrawn by Defendants, Plaintiff and Third Party Defendant's Motion for Summary Judgment are hereby **DENIED.**

II. FACTUAL AND PROCEDURAL HISTORY

 3

THI is a limited liability corporation formed and operating under the laws of the State of South Carolina. Terlizzi is the president of THI and is its qualifying licensed residential home builder and only Member. The Bohelers are citizens and residents of Richland County, South Carolina.

THI and Terlizzi by and through John Harding (hereinafter "Harding"), contracted to construct a home for the Bohelers in Newberry County, South Carolina. Harding was not a licensed contractor, but he was operating under Terlizzi's contractor's license with Terlizzi's permission. THI and Terlizzi had an agreement with Harding that the Boheler residence would be constructed by Harding with Terlizzi's license. In his own responses to discover Terlizzi admits that he facilitated the construction by John Harding (an unlicensed contractor) by allowing the job to be performed under the general contractor's license of the Plaintiff. Plaintiff's responses to Defendant's Interrogatory #8. This arrangement was acknowledged in Terlizzi's deposition and John Harding's deposition.

There is no dispute that Mr. Terlizzi took no supervisory role as the general contractor over John Harding, but acted only as a conduit for money until the Boheler's contacted him to address problems at the home. As construction progressed thereafter, the dispute arose which resulted in THI ceasing work at the residence. Defendants have presented evidence that THI executed various lien waivers throughout the course of construction See Terlizzi Deposition, p. 142. Evidence has been presented the Bohelers have paid directly to THI and Harding payments in the amount of Two Hundred and Twenty-One Thousand and Sixty-Seven and 73/100 (\$221,067.73) Dollars of the Two Hundred and Twenty-Five Thousand and 0/100 (\$225,000.00) Dollar contract price. Evidence has been presented that Plaintiff's own accounting shows that he has expended at the most \$239,000 in labor and material on the property. THI then filed a lien in

the amount of \$106,000.00 allegedly for various extras and changes to plans. There is no dispute that no change orders or written agreements were executed for such extras and changes. See Harding Affidavit, ¶ 18

Defendants have presented an affidavit of John Harding indicating that he had agreed on behalf of THI, that the extras and changes demanded by THI were not extras but were part of THI's obligations under the contract. See Harding Affidavit. The affidavit indicates that John Harding discussed the impropriety of these claims with Mr. Terlizzi and that they were not accurate. The affidavit also goes on to say that Mr. Harding indicated that Mr. Terlizzi knew of the impropriety of the lien before he filed it. In his deposition Mr. Terlizzi has admitted that the amount was based on only his estimations rather than on his actual receipts and accounting of expenses incurred. See Terlizzi Deposition pp. 157-6

On February 21, 2012, THI filed its Lis Pendens, Summons, and Complaint for foreclosure of its mechanic's lien held on the Boheler's property. On March 23, 2012, the Bohelers filed their Answer, Counterclaim, and Third Party Claims. See Boheler's Answer, Counterclaims, and Third Party Claims including inter alia, negligence, negligent supervision, fraud, intentional infliction of emotional distress/outrage, conversion and abuse of process. Plaintiff and Terlizzi brought this Motion pursuant to 56(c) of SCRPC.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is only appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c) SCRPC; *See also Tupper v. Dorchester County*, 326 S.C. 318, 325,

487 S.E.2d 187, 191 (1997); *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998). "Summary judgment is inappropriate when further inquiry into the facts is desirable to clarify proper application of the law." *Wade v. Berkeley County*, 330 S.C. 311, 317-17, 498 S.E.2d 684, 687 (S.C. Ct. App. 1998) (citations omitted). "Summary judgment is not appropriate if facts are conflicting, or if the inferences to be drawn from the facts are doubtful [and] should not be granted even when the evidentiary facts are not in dispute, or if there is dispute as to the conclusion to be drawn from those facts." *Id.* "In deciding a motion for summary judgment, the evidence and all of its inferences must be viewed in the light most favorable to the non-moving party." *Id.* "At the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied." *Hill v. York County Sheriff's Dept.*, 313 S.C. 303, 308, 437 S.E.2d 179, 182 (Ct. App. 1993) (cert. den. 1994).

IV. DISCUSSION

A. Third Party Defendant's Motion for Summary Judgment on the Claim of Breach of Contract Accompanied by a Fraudulent Act Asserted Against William Terlizzi.

In order to state a claim for breach of contract accompanied by a fraudulent act, there must be a breach of contract, a fraudulent intent related to breaching the contract and not to its making, and there must be a fraudulent act accompanying the breach. *Floyd v. County Squire*, 287 S.C. 51, 53-54, 336 S.E.2d 502, 503-04 (Ct. App. 1985). Fraudulent intent is normally proved by the circumstances surrounding the case. *Id.* (citing *Sutton v. Continental Casualty Co.*, 168 S.C. 372, 167 S.E. 647 (1933)). "[A] fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design." *Harper v. Ethridge*, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (Ct. App. 1986) (citing *Welborn v.*

Dixon, 70 S.C. 108, 49 S.E. 232 (1904); *Sullivan v. Calhoun*, 117 S.C. 137, 108 S.E. 189 (1921)).

Defendants have alleged that a contract existed between themselves and Terlizzi. See Boheler's Answer, Counterclaims, and Third Party Claims, ¶¶ 101-06. They have also presented evidence that prior to breaching the contract Terlizzi approached Harding in an attempt to coerce him into cooperating in filing a lien designed to force the Boheler's to pay him. He knew at that time that there were no extras or add ons to which he was due; he knew he had signed lien waivers for the extras he was claiming; he knew Harding had collected the deposit; he knew that he had not incurred costs for material and labor in the amount of the lien he placed on the home. See Harding Affidavit and deposition of Terlizzi. There is evidence before the Court that when he walked off the job he did so with the intent to file a fraudulent and improper lien to gain a collateral advantage over the Bohelers. THI can only act through its agents and in this case Mr. Terlizzi.

Given the foregoing evidence in the light most favorable to the Defendants, there is, at the very least, a dispute as to one or more material facts of the claim of breach of contract accompanied by a fraudulent act asserted against William Terlizzi. Therefore, a grant of summary judgment on this claim is **denied**.

B. Motion For Summary Judgment on the Claim of Intentional Infliction of Emotional Distress/Outrage Asserted Against William Terlizzi.

The Supreme Court of South Carolina has adopted the following definition of intentional infliction of emotional distress/outrage:

[I]n order to recover for the intentional infliction of emotional distress, a plaintiff must establish that (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct, Restatement (Second) of Torts § 46, Comment i; (2) the conduct was so "extreme and outrageous" as to exceed "all possible bounds of

decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community," Restatement (Second) of Torts s 46, Comment d ; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was "severe" so that "no reasonable man could be expected to endure it." Restatement (Second) of Torts s 46, Comment j. Although "severe" emotional distress is usually manifested by "shock, illness or other bodily harm," such objective symptomatology is not an absolute prerequisite for recovery of damages for intentional . . . infliction of emotional distress. Restatement (Second) of Torts s 46, Comment k.

Ford v. Hutson, 276 S.C. 157, 162, 276 S.E.2d 776, 778-79 (1981) (quoting *Vicnire v. Ford Motor Co.*, 401 A.2d 148 (Me. 1979)).

In the light most favorable to the Defendants, there is evidence to support the claim that Terlizzi inflated the mechanic's lien so that he could force the Bohelers to pay him additional money that he was not entitled to. He did so knowing that it would distress the Bohelers because their entire life savings were invested in the home. There is evidence that the lien was calculated to bring the Bohelers to the point of financial ruin in order to gain a collateral advantage over the contractual dispute between them. With the fact views in the light most favorable to the Defendant the Court finds that a question of fact exists by which a jury might determine that Mr. Terlizzi's actions rise to the threshold required under *Ford*. Given the foregoing evidence, there is, at the very least, a dispute as to one or more material facts of the claim of intentional infliction of emotional distress/outrage, and therefore, summary judgment on that claim is hereby **Denied**.

C. Summary Judgment on the Claim of Unfair Trade Practices Act Violation Asserted Against THI.

Under the South Carolina Unfair Trade Practices Act (hereinafter "UTPA"), "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. Code Ann. § 39-5-20 (1976). "'Trade' and 'commerce' shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article,

commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.” S.C. Code Ann. § 39-5-10 (1976). “The provision of any service constitutes commerce within the meaning of the UTPA. The statute does not exclude professional services from its definition.” *Taylor v. Medecina*, 324 S.C. 200, 217, 479 S.E.2d 35, 44 (1996). “To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s).” *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006). “A trade practice is ‘unfair’ when it is offensive to public policy or when it is immoral, unethical, or oppressive; a practice is ‘deceptive’ when it has a tendency to deceive.” *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 326, 396 S.E.2d 105, 108 (1989) (citing *Harris v. NCNB*, 85 N.C.App. 669, 355 S.E.2d 838 (1987)). “The [UTPA’s] ‘public interest’ requirement may be satisfied in South Carolina if the alleged unfair or deceptive acts or practices have the potential for repetition; potential for repetition may be shown in two ways: ‘(1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts.’” *Liberty Mut. Ins. Co. v. Employee Resource Management, Inc.*, 176 F.Supp.2d 510, 516 (2001) (citing *Daisy Outdoor Advertising Co., Inc. v. Abbott*, 322 S.C. 489, 494, 473 S.E.2d 47, 49-50 (1996)).

There is evidence before the court that THI may have acted in an unfair or deceptive manner throughout the contracting and construction process. THI held forth Harding as their agent, allowing Harding to operate under their building license, knowing he was unqualified to construct a home. See Terlizzi Deposition, p. 26. Terlizzi had no intention of acting as a

contractor for the job despite knowing that John Harding was not qualified to build the home. Terlizzi was to only act as "a conduit for the money" and "had no intention of providing supervision" which is required of a builder.

With the evidence presented in the light most favorable to the Defendants there is evidence that THI entered into the contract with the Bohelers with the intent of allowing an unlicensed builder construct the home completely without supervision of Mr. Terlizzi. There is evidence before the Court that a jury may conclude that it was only his intent to control the money and take a share of the profits.

THI's unfair and deceptive act of allowing unlicensed contractor to perform work under their license affects the public interest because of the potential for repetition. This act could easily be repeated and affect the public at large.

There is evidence that THI's unfair and deceptive acts, the Bohelers suffered economic loss and damages. Given the foregoing evidence, there is, at the very least, a dispute as to one or more material facts of the claim of a UTPA violation, and therefore, summary judgment on that claim is Denied.

D. The Court Should Not Grant Summary Judgment on the Claim of Conversion Asserted Against William Terlizzi and THI.

Conversion "has been defined as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another or the alteration of their condition or the exclusion of an owner's rights." *Castell v. Stephenson Finance Co.*, 244 S.C. 45, 51, 135 S.E.2d 311, 313 (1964) (citation omitted) "Conversion is a tortious act and may arise either by a wrongful taking of the chattel or by some other illegal assumption of ownership, by illegally using or misusing it, or by wrongful detention." *Id.* To recover in an action for conversion, the plaintiff must prove: (1) an interest by the plaintiff in the thing converted; (2) the

defendant converted the property to his own use; (3) the use was without the plaintiff's permission. SC-JICIV 3-2, Anderson, S.C. Requests to Charge - Civil, § 3-2 (2009). "Money may be the subject of conversion, when it is capable of being identified, and there may be conversion of determinate sums even though the specific coin and bills are not identified." 89 C.J.S. Trover and Conversion § 23, p. 541 (1955).

The Bohelers clearly had an interest in the "thing" converted – the remaining construction deposit that was supposed to be returned to the Bohelers upon completion of construction. This refundable deposit is certainly something in which the Bohelers would have an interest and a right. There is evidence before the Court that Terlizzi and THI knew that the deposit had been paid to Harding. Terlizzi and THI now claim that Harding was not his or THI's agent and disclaims the payment of the deposit because it was not paid to directly to THI. At the same time THI and Terlizzi, claims the benefit work done with that money. If this is the case then there is a question of fact as to where that money went and who is responsible for its accounting. The Bohelers have paid money to someone for which they are not getting credit. There is evidence before the court that THI, through its agent Harding converted that money to their own purpose and now must be held liable for that.

THI and Terlizzi further claim that their only responsibility for the contract initially was to "be a conduit for the money" See THI responses to Interrogatories. Because Terlizzi intended to have no role as a supervisor or builder, their role was that of a fiduciary to hold and distribute the money paid. In his deposition Terlizzi admitted that he was only to be paid money "if there was profit". Terlizzi placed the money in his general account and has kept no separate records of its accounting Terlizzi did not keep a separate accounting of the money and placed it in his general account where he used the money for his own personal use. Given the foregoing

evidence, there is, at the very least, a dispute as to one or more material facts of the claim of conversion and therefore, a grant of summary judgment on that claim is denied.

**E. Summary Judgment on the Claim of Abuse of Process Asserted
Against William Terlizzi and THI.**

Abuse of process is defined as “the employment of legal process for some purpose other than that [for] which it was intended by the law to effect-the improper use of a regularly issued process.” *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 210, 153 S.E.2d 693, 695 (1967) (quoting 34 Am. Jur. *Malicious Prosecution* § 3, at 704). The elements of abuse of process are “an ulterior purpose and a willful act in the use of the process not proper in the regular course of the proceeding.” *Hainer v. American Med. Int'l, Inc.*, 328 S.C. 128, 136-37, 492 S.E.2d 103, 107 (1997). Furthermore, “[t]he improper purpose usually takes the form of ‘coercion to obtain a collateral advantage, not properly involved in the proceeding itself.’” *Id.* at 136, 492 S.E.2d at 107.

A mechanic’s lien is designed to allow a contractor to be assured recovery actual expenses incurred in the construction of a residence. There is evidence before the Court that Mr. Terlizzi and THI may have filed an improper and exaggerated mechanic’s lien with an ulterior purpose, to seek an unjustifiable amount with the goal of forcing the Bohelers to pay for alleged extra costs that cannot be accounted for and were not authorized. *See Harding Affidavit*, ¶¶ 20-26. There is evidence before the Court that Terlizzi and THI may have had no legitimate justification for his \$106,001.13 claim under the mechanic’s lien. Mr. Harding in his affidavit asserts that Terlizzi and THI are purposefully seeking more money than is due them under the contract. *See Terlizzi Deposition*, pp. 157-63; *Harding Affidavit*, ¶ 26. Given the foregoing evidence, there is, at the very least, a dispute as to one or more material facts of the claim of abuse of process and therefore, a grant of summary judgment on that claim is denied.

V. CONCLUSION

In sum, for the foregoing reasons, Plaintiff THI's, and Third Party Defendant Terlizzi's Motion for Summary Judgment are DENIED.

Florence
Columbia, South Carolina
June 13, 2013



Judge R. Knox McMahon

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-36-0090

Terlizzi Home Improvement, LLC

Michael L. Boheler, Jeannette A. Boheler

PLAINTIFF(S)

Midlands Mortgage Corp
DEFENDANT(S)

Submitted by: Court

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

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- ☐ **ACTION STRICKEN (CHECK REASON):** ☒ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendants' Michael and Jeannette Boheler's Motion for Partial Summary Judgment came before the court on March 12, 2014 in Newberry County. For the following reasons, the court finds the Boheler's motion shall be granted.

A mechanic's lien is a creature of statute. South Carolina law provides four ways to discharge a mechanic's liens, one of which is by showing the filer of the lien has willfully and knowingly claimed more than is due pursuant to S.C. Code Ann 29-5-100. Additionally, 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. Sea Pines Co. v. Kiawah Island Co., Inc., 268 S.C. 153, at 157 (1977).

S.C. Code Ann. 29-5-100 provides that an inaccuracy in the statement of the amount due for labor and materials supporting a mechanic's lien shall not invalidate the lien "unless it appear[s] that the person filing the certificate has willfully and knowingly claimed more than is due." To willfully and knowingly act in a manner has been held to have the same effect as one who acts with a conscious failure to exercise due care or with a conscious disregard for the truth.

Upon a complete review of the records, this court concludes that Mr. Terlizzi clearly violated 29-5-100 in that he wilfully and knowingly overstated the sum due in filing the lien. The court can find no rational basis for how Mr. Terlizzi initially came up with the \$106,001.13

figure for the lien. In his own deposition Terlizzi admitted the figure was not based on what his material and labor costs were. *See Terlizzi Depo p. 93.* Mr. Terlizzi's own testimony indicates that, despite valid lien waivers being signed, he still used included the value of property subject to these waivers in the lien amount filed. *Id. p. 142.* Furthermore, Mr. Harding states Mr. Terlizzi approached him with the idea of placing a lien on the property so large that they would have the Bohelers "over a barrel." (Harding Aff. 18). Although 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.

Under South Carolina law, a court cannot dissolve a lien if the contractor makes a prima facie showing for filing the lien or if the amount owed depends upon which of the parties' allegations are to be believed. *See Pines Co. v. Kiawah Island Co.*, 268 S.C. 153, 232 S.E.2d 501 (1977); *Black v. Haile*, 270 S.C. 93, 240 S.E.2d 646 (1978). "A mechanic's lien, by its own terms, secures a debt 'for labor performed or furnished or for materials furnished and actually used.'" *Sea Pines Co., id.*, at 503. Terlizzi has made no prima facie showing for filing the lien, neither does the amount owed depend on which of the parties allegations is to be believed. No factual basis existed for Terlizzi filing a mechanics lien in the sum of \$106,001.13. Plaintiff claims to have made a "good faith estimation" in arriving at this figure. *See Terlizzi Depo. p. 109.* Again, 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 Plaintiff has now stipulated to reducing the lien to \$48,719.23, a figure which arguably accounts for the outstanding work and labor actually put into the home. *See Terlizzi Depo. p. 153-155.* This reduced amount is a drastic deviation from the original lien amount.

The court simply can find no rational basis in the record which would make the initial \$106,001.13 lien valid. The court does not find the fact that a new lien amount has been stipulated to affects the validity, or lack thereof, of the original lien amount, and therefore finds Plaintiff's Supplemental Argument, received via e-mail March 13, 2014, unpersuasive.

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, 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 the contractor Plaintiff.

Mechanics liens serve the laudable goal of protecting contractors who, in good faith, personally incur obligations for materials 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 they know are wholly unsupported and the result of mere guesswork.

Accordingly, Defendants' Motion for Partial Summary Judgment is granted, and Plaintiff's lien is ordered discharged. Counsel for Defendants is requested to prepare a more formal order.

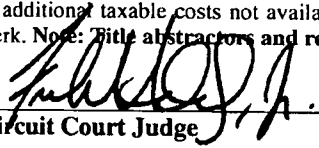
ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. ~~Note: Title abstractors and researchers should refer to the official court order for judgment details.~~


Circuit Court Judge

2159

Judge Code


Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Robert M. Cook, II

Charles A. Crawczyk

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Tara Scott

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF NEWBERRY	)	CIVIL ACTION NO. 2012-CP-36-00090
Terlizzi Home Improvement, LLC,	)	
Plaintiff,	)	
vs.	)	
Michael L. Boheler, Jeannette A. Boheler, and The Palmetto Bank as Assignee of Midlands Mortgage Corp.,	)	ORDER
vs.	)	
William Terlizzi	)	
Defendants.	)	

FILED
 NEWBERRY COUNTY
 2014 JUL 7 AM 10 49
 JACKIE S. BOWERS
 CLERK OF COURT

Dates of Hearing:

March 12, 2014 and May 8, 2014

Trial Judge:

The Hon. Frank R. Addy, Jr.

Plaintiff's Attorneys:

Robert M. Cook, Esq.

Defendants' Attorney:

Charles A. Krawczyk, Esq.

This matter came before the Court on March 12, 2014, for a hearing pursuant to Defendants/Third Party Plaintiffs Michael L. Boheler and Jeanette A. Boheler's Motion for Partial Summary Judgment, whereby the Defendants sought a dismissal of Plaintiff Terlizzi Home Improvement, LLC's ("THI") claim for foreclosure of its Notice of Certificate of Mechanic's Lien and Statement of Account and Affidavit in Support of Mechanic's Lien, 2011-LN-36-634 (collectively "the Lien") filed on September 6, 2011.

Defendant Michael Boheler was present in the Court together with his attorney, Charles A. Krawczyk, Esquire. Representative for Plaintiff THI and Third Party Defendant William Terlizzi was also present in the Court together with his attorney, Robert M. Cook, Esquire.

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The court subsequently issued a form 4 granting the Defendant's/Third Party Plaintiffs' motion. Counsel for the Bohelers submitted a proposed formal order and attorney fee affidavit to the court on April 24, 2014. Upon receiving Terlizzi's counsel's request for a hearing on the issues of attorney's fees and costs and Terlizzi's personal liability, the court held a hearing on May 8, 2014. Upon conclusion of the hearing, Boheler's counsel submitted an amended Attorney's Fees Affidavit which the court has reviewed in full. For the reasons stated at the hearings and explained herein, the Boheler's motion is **GRANTED**.

A. Motion for Partial Summary Judgment

A mechanic's lien is a creature of statute. South Carolina law provides four ways to discharge a mechanic's liens, one of which is by showing the filer of the lien has willfully and knowingly claimed more than is due pursuant to South Carolina Code Ann. § 29-5-100. Additionally, 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. *Sea Pines Co. v. Kiawah Island Co., Inc.*, 268 S.C. 153 at 157 (1977).

S.C. Code Ann. 29-5-100 provides that an inaccuracy in the statement of the amount due for labor and materials supporting a mechanic's lien shall not invalidate the lien "unless it appear(s) that the person filing the certificate has willfully and knowingly claimed more than is due." To willfully and knowingly act in a manner has been held to have the same effect as one who acts with a conscious failure to exercise due care or with a conscious disregard for the truth.

Upon a complete review of the records, this Court concludes that Mr. Terlizzi clearly violated § 29-5-100 in that he willfully and knowingly overstated the sum due in filing the lien. The court can find no rational basis for how Mr. Terlizzi initially came up with the \$106,001.13 figure for the lien. In his own deposition, Mr. Terlizzi admitted the figure was not based on what

his material and labor costs were. See Deposition of William Terlizzi, p. 93. Mr. Terlizzi's own testimony indicates that, despite valid lien waivers being signed, he still included the value of property subject to these waivers in the lien amount filed. *Id.* p. 142. Furthermore, John Harding, Mr. Terlizzi's partner on the job, states Mr. Terlizzi approached him with the idea of placing a lien on the property so large that they would have the Bohelers "over a barrel." Affidavit of John Harding, ¶ 18.¹ Although Mr. 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.

Under South Carolina law, a court cannot dissolve a lien if the contractor makes a *prima facie* showing for filing the lien or if the amount owed depends upon which of the party's allegations are to be believed. See *Pines Co. v. Kiawah Island Co.*, 268 S.C. 153, 232 S.E.2d 501 (1977); *Black v. Haile*, 270 S.C. 93, 240 S.E.2d 646 (1978). "A mechanic's lien, by its own terms, secures a debt 'for labor performed or furnished or for materials furnished and actually used.'" *Id.* at 503. Mr. 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 Mr. Terlizzi filing a mechanics lien in the sum of \$106,001.13. Plaintiff claims to have made a "good faith estimation (sic)" in arriving at this figure. See Terlizzi Depo. p. 109. Again, 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 Plaintiff has now stipulated to reducing the lien to \$48,719.23, a figure which arguably accounts for the outstanding work and labor actually put into the home. See Terlizzi

¹ To the extent this statement may be disputed and even if the court were to discount entirely this statement, Plaintiff Terlizzi's calculation of the initial lien amount remains grossly negligent at the very least.

Depo.p.153-155. This reduced amount is a drastic deviation from the original lien amount and evidences a wilful disregard for *any* care in calculating the initial lien amount.

Simply stated, this Court cannot find, and Mr. 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. Therefore, the court finds Plaintiff's Supplemental Argument, received via e-mail March 13, 2014, unpersuasive.

This Court notes that it does not take this action lightly. Had Mr. Terlizzi's initial lien had some basis in fact, had Mr. Terlizzi not included in the lien amount work for which lien waivers had already been executed, had Mr. Terlizzi not admitted to "reverse engineering" the sums, had some modicum of care been executed by Mr. Terlizzi, or had direct evidence of an effort to put the Bohelers "over a barrel" not existed, this Court's order might be different. By filing a lien completely lacking in accuracy and of specious validity, Mr. 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 the contractor Plaintiff.

Mechanics liens serve the laudable goal of protecting contractors who, in good faith, personally incur obligations for materials 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 an 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.

B. Attorney's Fees

South Carolina Code Ann. § 29-5-20(a) states in part that "[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." (emphasis added).

This court finds that Mr. Terlizzi willfully and knowingly filed a lien for more than he was due, a lien with an amount with no basis in fact and which included in the lien amount work *for which lien waivers had already been executed*. The Court finds direct evidence, through Mr. Terlizzi's partner, John Harding, that Mr. Terlizzi intended to make the lien large enough to "put the Boheler's over a barrel." *See Harding Aff.*, ¶ 18. As early as September 14, 2011 the Boheler's had communicated their concerns to Mr. Terlizzi. They indicated on several occasions that Mr. Terlizzi was seeking more than he was due and asked him to perform an accounting and reduce the lien to an accurate amount so that it could be bonded off and the parties litigate their differences. *See September 14, 2011 e-mail from Charles Krawczyk to Robert Cook*. Counsel for the Bohelers even went so far as to state that "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 mechanic's lien statute and may subject him to attorney's fees and costs". *Id.* Not only did Mr. Terlizzi refuse to perform an accounting or reduce his lien, he filed this action to foreclose and insisted that the Boheler's raise the \$143,000.00 necessary to bond off the lien. In so doing he knew that his actions might subject him the award of attorney's fees and costs. The Boheler's were able to raise the money, but at great financial peril and hardship as documented in the record. They were also forced to litigate this matter for almost two years



before Mr. Terlizzi reduced his lien to what his counsel indicated was “a more defensible number.”

The court wants to be perfectly clear on a crucial point central to the court's ruling: This case does not represent the typical mechanic's lien dispute where dismissal of the lien is based upon an untimely filed lien or failure to follow the statutory requirements. The actions by Mr. Terlizzi were intentional, wanton, and with a conscious disregard for the truth. This was not just a minor accounting mistake. The only reasonable inference from the evidence is that Mr. Terlizzi signed the affidavit and statement of account knowing he was not entitled to the amounts he sought. In short, he guessed at the numbers and intentionally inflated them intending to create an insurmountable financial burden for the Bohelers. After the Bohelers requested an accounting, Mr. Terlizzi refused to cooperate. These actions are not actions taken in the ordinary course of his ownership of the Plaintiff entity, nor are they merely negligent.² These actions are *ultra vires* for which Mr. Terlizzi may be held personally liable. Moreover, a member of a limited liability company cannot use it as a shield for personal liability for his own intentional acts. See Jeffrey S. Quinn, Allen v. Dackman: Doing Away with Limited Liability in Maryland, 70 Md. L.Rev. 1171, 1216 (“The economic justifications and, specifically, the concept of limited liability support an interpretation of the [LLC act] that protects members from personal liability *when acting in good faith* service of the LLC.”)(emphasis supplied) Mr. Terlizzi, as a Third Party Defendant to this action and the only individual who could direct the actions of the LLC, is personally subject to the court's findings and is personally liable for the reasons outlined above.

The court finds that Mr. Terlizzi should not be allowed to use his LLC to shield him from personal liability for his personal actions. Section 33-44-409 provides that a member's duty of

² Cf. 16 Jade Street, LLC v. R. Design Const. Co., 398 S.C. 338, 728 S.E.2d 448 (2012) (holding that an owner of a LLC is not exempt from personal liability for simple negligence), *withdrawn*, 16 Jade Street, LLC v. R. Design Const. Co., LLC., 405 S.C. 384, 747 S.E.2d 770 (2013).

care in the conduct of a company's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law. Mr. Terlizzi's conduct, described in detail above, can only be described as the exact type of conduct the statute proscribes: gross negligence, recklessness, intentional misconduct, and/or a knowing violation of the law. As with any limited liability company, this LLC could only act through and at the direction of Mr. Terlizzi.³ Any intentional action taken by Mr. Terlizzi, even though it may ostensibly be taken through Terlizzi Home Improvement, LLC, remains the individual action of Mr. Terlizzi, and Section 33-44-303 does not insulate him from his own conduct under the facts of this case.⁴ The court finds this type of conduct clearly prohibited under the law. Therefore, because Mr. Terlizzi personally directed these knowing, intentional (or at the very least, grossly negligent) acts he is personally liable.

The Defendants have submitted an attorney's fee affidavit which the Court has reviewed in detail. The Court finds it meets the factors necessary to determine reasonable attorney's fees as set out in Rule 407, South Carolina Appellate Court Rules and *Spriggs Group, P.C. V. Slivka*, 402 S.C. 42, 738 S.E.2d 295 (Ct. App. 2013), as well as being proper and necessary under South Carolina Code Ann. § 29-5-20(a).

The Bohelers are the prevailing party under South Carolina Code Ann. § 29-5-20(a). As authorized by this statute and as a result of Mr. Terlizzi's egregious conduct, Michael and Jeanette Boheler, should be awarded \$31,611.75 for the fees and costs of defending against the mechanic's lien in this matter. Further, the aforementioned intentional acts by Mr. Terlizzi were

³ Clearly, not all actions taken by Terlizzi on behalf of the LLC would render Terlizzi personally liable. See Section 33-44-303(a).

⁴ Cf. Section 33-6-220(b); Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 208-09, 687 S.E.2d 714, 720 (Ct. App. 2009) (Status as an officer or shareholder of corporation does not shield individual from personal liability for an intentional tort committed through the corporation); Dutch Fork Development Group, II, LLC v. SEL Properties, LLC, 406 S.C. 596, 753 S.E.2d 840 (2012) (Concerning imposition of individual liability upon a LLC manager under tortious interference of contractual relations theory).

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ultra vires and beyond his power as a representative of THI. Therefore, THI *and* Mr. Terlizzi, individually, should be responsible for these costs incurred defending against the lien.

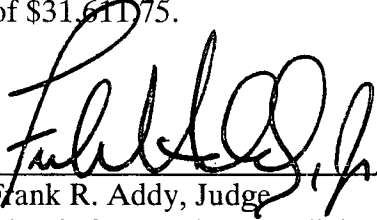
NOW THEREFORE, based upon the pleadings duly filed, the evidence before the Court, the arguments of counsel, and the laws of this state set forth above,

IT IS HEREBY ORDERED THAT:

- a. Defendants/Third Party Plaintiffs Michael and Jeanette Boheler's Motion for Partial Summary Judgment is granted
- b. Plaintiff Terlizzi Home Improvement's Mechanic's Lien, 2011-LN-36-634 is discharged;
- c. Plaintiff Terlizzi Home Improvement's claim for foreclosure of Mechanic's Lien, 2011-LN-36-634 is dismissed with prejudice; and
- d. Plaintiff Terlizzi Home Improvement and Third Party Defendant William Terlizzi, individually, shall pay the Defendants/Third Party Plaintiffs' attorney's fees and costs associated with defending against Mechanic's Lien, 2011-LN-36-634 and its foreclosure in the amount of \$31,611.75.

AND IT IS SO ORDERED.

Greenwood, South Carolina
July 1, 2014



Frank R. Addy, Judge
Circuit Court, Eighth Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-36-00090

TERLIZZI HOME IMPROVEMENT, LLC

MICHAEL L. BOHELER, JEANNETTE A.
BOHELER AND THE PALMETTO BANK AS
ASSIGNEE OF MIDLANDS MORTGAGE
CORP.

DEFENDANT(S)/THIRD-PARTY
PLAINTIFF(S)

WILLIAM TERLIZZI

PLAINTIFF(S)

THIRD PARTY DEFENDANT

Submitted by:	Attorney for Defendant	☐ Plaintiff	☐
		☐ Self-Represented Litigant	

Disposition Type (Check One)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 4(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This matter came before the court on October 16, 2014 pursuant to Plaintiff's Motion to Reconsider the Court's Order dated July 1, 2014. Said Order (1) granted Defendant/Third Party Plaintiff's Motion for Partial Summary Judgment, (2) dismissed Plaintiff's Mechanic's Lien, 2011-LN-36-634, (3) dismissed Plaintiff's claim for foreclosure of Mechanic's Lien, 2011-LN-36-634 with prejudice, and (4) ordered Plaintiff Terlizzi Home Improvement and Third Party Defendant William Terlizzi to pay Defendants' attorney's fees and costs, totaling \$31,611.75.

After reviewing all relevant materials on file and considering testimony of the parties at the above referenced hearing, Plaintiff's motion to reconsider is denied.

Plaintiff's motion to reconsider is **denied** and the Order dated July 1, 2014 shall stand.

Order Information

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

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Complete if judgment requires payment of a sum of money or affects title to real or personal property			
JUDGMENT AGAINST PLAINTIFF:		JUDGMENT AGAINST DEFENDANT:	
Judgment Amount	\$ _____	Judgment Amount	\$ _____
Taxable Costs	\$ _____	Taxable Costs	\$ _____
Attorney's Fees	\$ _____	Attorney's Fees	\$ _____
Interest	\$ _____	Interest	\$ _____
Other:	\$ _____	Other:	\$ _____
Total Amount to be Enrolled:	\$ _____	Total Amount to be Enrolled:	\$ _____
If applicable, describe the property, including tax map information and address, referenced in the order.			

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interests or costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

[Signature]
Circuit Court Judge

2159

10/17/2014

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the 20th day of October, 2014 and a copy mailed first class this 22nd day of October, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Robert Cook

*PO Box 3575
Greenville, SC 29070*

ATTORNEY(S) FOR THE PLAINTIFF(S)

Charles Krawczyk

*PO Box 7799
Columbia, SC 29202*

ATTORNEY(S) FOR THE DEFENDANT(S)

Jackie S. Bowers
CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS

C.A. NO. 2011 LN 36-634

Terlizzi Home Improvement, LLC,)

Plaintiff,)

vs.)

Michael L. Boheler, Jeannette A. Boheler,)
and The Palmetto Bank as assignee of)
Midlands Mortgage Corp.,)

Defendants.)

NOTICE AND CERTIFICATE
OF MECHANIC'S LIEN

JACKIE S. BOWERS
CLERK OF COURT

2011 SEP - 6 A 11: 42

NEWBERRY COUNTY

FILED

NOTICE IS HEREBY GIVEN that there is now due and owing to the above named Plaintiff the sum of **ONE HUNDRED AND SIX THOUSAND AND ONE AND 13/100 (\$106,001.13) DOLLARS** as shown by a statement of a just and true account of said indebtedness, with all credits given, being attached hereto and made a part hereof, together with interest, attorney's fees and costs.

Said debt is due Plaintiff for materials furnished and/or labor performed or furnished, and actually used in the erection, alteration or repair of buildings or structures situated on, or otherwise improving, the real estate herein described, with the knowledge and consent of the within Boheler Defendants, the owners of said property, or by a person or persons authorized by, or rightfully acting for, said owners; or said debt is due Plaintiff because such improvements have been authorized by said owners. As shown on the Statement of Account, attached, Plaintiff furnished materials, or provided labor and materials, for such improvements within ninety (90) days of the date hereof.

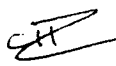
By virtue thereof and by the filing of this Notice and Certificate, and pursuant to the applicable provisions of Title 29 of the South Carolina Code of Laws, or otherwise, Plaintiff has and claims a lien to secure the payment of the above-stated indebtedness so due and the costs, including attorney's fees, of enforcing said lien upon the improvements hereinabove mentioned and upon the following described real estate:

PROPERTY DESCRIPTION
6.57 ACRE PARCEL

All that certain piece, parcel or tract of land with all improvements thereon, if any, situate, lying and being in the County of Newberry, State of South Carolina, being shown and delineated as Lot 2 containing 6.57 acres, more or less, on a survey prepared for Norman E. Fisher, Jr. and Michael L. Boheler by Robert Carter Bozard, SCPLS# 19005, dated July 19, 2008 and recorded May 4, 2009 in Plat

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Book C216 at Page 7 in the Office of the Clerk of Court for Newberry County; and having such metes and bounds as are shown on said plat, this description being in lieu of metes and bounds, as permitted under Section 30-5-250 of the 1976 Code of Laws of South Carolina, as amended.

Together with the right for ingress and egress on the gravel drive to Lot 2 as shown on the above referenced plat, and also with the right to place any utilities, including but not limited to, cable television line, power lines, water lines, sewer lines, telephone lines, or any other utility, with the right to remove any undergrowth from the right-of-way area, and to perform any and all necessary actions to maintain said easement for the purposes stated herein.

DERIVATION: This being the identical property conveyed to Michael L. Boheler and Jeannette A. Boheler by deed of Norman E. Fisher, Jr. and Sarah M. Fisher, dated April 27, 2009 and recorded May 4, 2009 in Record Book 1428 at Page 262, Office of the Clerk of Court for Newberry County, South Carolina.

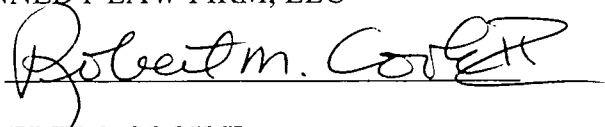
TAX MAP REFERENCE: TMS# 691-42

PROPERTY ADDRESS: 365 Blackberry Lane, Pomaria, SC.

The Defendant listed below is named, upon information and belief, because it holds or held a mortgage(s) upon all or a portion of the Boheler Defendants' real property as described hereinabove.

THE PALMETTO BANK, AS ASSIGNEE OF MIDLANDS MORTGAGE CORP.

KENNEDY LAW FIRM, LLC

BY: 

ROBERT M. COOK II

125 East Church Street

P.O. Box 2559

Batesburg-Leesville, South Carolina 29070

(803) 532-4100 (phone)

(803) 532-0909 (fax)

robcook1965@yahoo.com

ATTORNEY FOR TERLIZZI HOME
IMPROVEMENT, LLC

September 6, 2011

28

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS

C.A. NO. 2011 LN 36-634

Terlizzi Home Improvement, LLC,)

Plaintiff,)

vs.)

Michael L. Boheler, Jeannette A. Boheler,)
and The Palmetto Bank as assignee of)
Midlands Mortgage Corp.,)

Defendants.)

**STATEMENT OF ACCOUNT
AND AFFIDAVIT IN SUPPORT
OF MECHANIC'S LIEN**

JACQUE S. BOWERS
CLERK OF COURT

2011 SEP -6 A 11:42

NEWBERRY COUNTY

FILED

PERSONALLY appeared before me, William Terlizzi, who being sworn, deposes and says that he is the owner of Terlizzi Home Improvement, LLC, a limited liability company existing under the laws of the State of South Carolina, and that he makes this Affidavit of his personal knowledge of the matters set forth herein and that the amount listed below is a just and true account of the monies owed for labor, materials and supplies furnished to or on behalf of the Defendants Michael L. Boheler and Jeannette A. Boheler. At the special direction, knowledge, consent, authorization and/or request of those Defendants, the Plaintiff furnished labor, materials and/or supplies which were actually used in the improvement of the real estate described more fully in the Notice of Mechanic's Lien, filed this same date, said property being shown as TMS# 691-42 located in Newberry County, South Carolina, and bearing an address of 365 Blackberry Lane, Pomaria, South Carolina. These materials, labor and/or supplies furnished consisted of items used in erecting/repairing/improving the dwelling and all appurtenances needed therefore on the land of the Boheler Defendants as hereinabove described and further described with the Notice of Mechanic's Lien. That Plaintiff last furnished and supplied materials and/or labor to that property, and which materials and supplies were used as improvements on that property, on August 25, 2011, and the Plaintiff has been prevented from returning to the property by the Boheler Defendants.

DEPONENT FURTHER STATES that the Statement of Account for unpaid labor, materials and supplies used for the benefit of the Boheler Defendants as described above, is as follows:

ORIGINAL CONTRACT AMOUNT	\$225,000.00
EXTRA COST DUE TO CHANGED PLANS	\$27,570.00
EXTRAS AND ADD-ONS REQUESTED BY OWNERS	\$44,306.13
(LESS PAYMENTS BY OWNERS)	\$190,875.00
BALANCE DUE	\$106,001.13

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Deponent further states that no sums have been paid on that account since August 22, 2011, and there now remains due and owing the sum of **ONE HUNDRED AND SIX THOUSAND AND ONE AND 13/100 (\$106,001.13) DOLLARS**, no part of which has been paid by discount or otherwise, which sum is now past due and to which your deponent is entitled to prejudgment interest at the rate allowed by law since the date of last payment, or the contract rate if higher, plus the costs of this action, to include attorneys fees and costs as provided by statute.

ATTEST: TERLIZZI HOME IMPROVEMENT, LLC

By: 

WILLIAM TERLIZZI,
OWNER AND AUTHORIZED AGENT

SWORN to before me this
the 6th day of September, 2011

 (LS)

Notary Public for South Carolina

My commission expires: 09-23-2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF NEWBERRY	)	
Terlizzi Home Improvement, LLC,	)	CIVIL ACTION NO. 2011-LN-36-634
	)	
Plaintiff,	)	
	)	
vs.	)	MOTION TO DISMISS MECHANIC'S LIEN
	)	AND REQUEST FOR EXPEDITED
Michael L. Boheler, Jeannette A. Boheler,	)	HEARING
and The Palmetto Bank as Assignee of	)	
Midlands Mortgage Corp.,	)	
	)	
Defendants.	)	
	)	

COMES NOW, Michael L. Boheler and Jeannette A. Boheler by and through their undersigned attorney responding to the Notice and Certificate of Mechanic's Lien filed on September 6, 2011 by Terlizzi Home Improvement, LLC (the "Lien") and seeks its dismissal pursuant to SC Statute 29-5-15. Defendants would show that the lien filed by Terlizzi Home Improvement LLC, is invalid because it did not follow the statutory requirements in its filing by failing to include the Plaintiffs South Carolina Residential Builder's License information.

Further Defendants would move the Court for an expedited hearing for this matter pursuant to Rule 16. The Defendants must have a timely hearing on this matter or they will face extreme prejudice. The Defendants are aware that this is the second expedited hearing requested in this matter, but the passage of time has continued to create bigger problems for the Bohelers. To the extent that the Court would consider the continuing damages suffered by the Bohelers they respectfully request an expedited hearing. The house continues to sit vacant and without any further construction. No certificate of occupancy can be obtained. The loan cannot be converted to permanent financing so the Defendants face an increase in finance charges. The home cannot be completed in a timely manner and may be subject to foreclosure. The Home sits on family property that has personal and sentimental value to the Defendants. Should the property be the subject

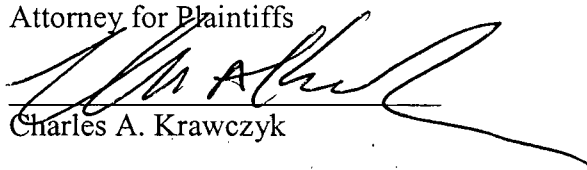
of foreclosure, the Defendants would not have an adequate remedy in money damages. If this matter is not expedited it may result in damages to the Defendants including the loss of the family property, irreparable damage to their credit, further damage to the Home while it sits vacant and uncompleted as well as monetary damages as listed above.

It is likely that the Defendants will succeed on the merits of their claim as the statute is clear and unambiguous on the requirements for a valid lien and must be strictly construed. Therefore it is likely that the Lien will be dismissed in favor of the Defendants.

Wherefore Defendants would move this Court to dismiss the Lien with prejudice pursuant to SC Statute 29-5-15 and award Defendant all attorney's fees and costs for defending this claim. Due to the immediate and continuing harm to the Defendants they would also seek that this Court set a date for a hearing on this matter as soon after the ten (10) day requirement as is possible.

FINKEL LAW FIRM, L.L.C.

1201 Main Street, Suite 1800
Post Office Box 1799
Columbia, South Carolina 29202
(803) 765-2935
Attorney for Plaintiffs



Charles A. Krawczyk

Columbia, South Carolina
December 7, 2011

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

2011-LN-36-634

JACKIE S. BOWERS
CLERK OF COURT

2011 NOV -2 A 11:28

FILED
NEWBERRY COUNTY

Terlizzi Home Improvement, LLC,)
)
)

vs.)
)
)

Michael L. Boheler, Jeannette A. Boheler,)
and The Palmetto Bank as assignee of)
Midlands Mortgage Corp.,)
)
)
)
_____)

RETURN TO MOTION TO
DISMISS

TO: CHARLES A. KRAWCZYK, ESQUIRE, ATTORNEY FOR THE BOHELERS.

The lien-holder, Terlizzi Home Improvement, LLC, makes the following return to the motion to dismiss dated September 26, 2011, which seeks to have the Court of Common Pleas for Newberry County dismiss its mechanic's lien filed on September 6, 2011. This motion is improper and should be rejected by the Court as there currently is no civil action pending between these parties, but only a mechanic's lien that has been filed with the Court for notice purposes with no corresponding suit yet brought to foreclosure that lien and the homeowners have not filed any action seeking a declaratory judgment with regard to the validity of that mechanic's lien. See Rule 3, SCRCP ("A civil action is commenced when the summons and complaint are filed with the clerk of court") and S.C. Code Section 29-5-140 ("The lien may be enforced by petition to the court of common pleas"). This Court lacks jurisdiction to rule upon this motion to dismiss until such time as there is a properly filed civil action for which the required \$150.00 filing fee has been paid, a Common Pleas case number has been assigned, and for which an assignment to the appropriate docket per Rule 40, SCRCP, has been made. Until action has been taken either by way of the filing of a lien foreclosure suit or a suit for declaratory judgment there has been no joining of the issues by complaint and answer, nor has there been

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any way for discovery of the underlying issues to be conducted per the procedures permitted by the rules of civil procedure. Accordingly, the Court is requested to refuse to hear the motion to dismiss. In the event that the Court entertains the motion to dismiss, the lien-holder asserts that its mechanic's lien was filed in good faith and that even if there is a dispute about the amount owed to the lien-holder by the homeowners such dispute would not invalidate the lien itself under the express provisions of the S.C. Code Section 29-5-100. The lien-holder's defense to the motion to dismiss shall be supported by such additional argument and evidence as the Court may allow to specifically include such responsive affidavits as may be submitted at later date.

KENNEDY LAW FIRM, LLC

BY: Robert M. Cook II

ROBERT M. COOK II

125 East Church Street

P.O. Box 2559

Batesburg-Leesville, South Carolina 29070

(803) 532-4100 (phone)

(803) 532-0909 (fax)

robcook1965@yahoo.com

ATTORNEY FOR TERLIZZI HOME
IMPROVEMENT, LLC

November 1, 2011

STATE OF SOUTH CAROLINA)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS

C.A. NO. 2012-CP- 36-00090

Terlizzi Home Improvement, LLC,

Plaintiff,

vs.

**Michael L. Boheler, Jeannette A.
Boheler and The Palmetto Bank
As assignee of Midlands Mortgage Corp.,**

Defendants.

COMPLAINT

(Mechanic's Lien Foreclosure;
Unjust Enrichment; Breach of
Contract)

FILED
NEWBERRY COUNTY
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JACKIE S. BOWERS
CLERK OF COURT

The Plaintiff, complaining of the Defendants, would allege and show as follows:

FOR A FIRST CAUSE OF ACTION

(Foreclosure of Mechanic's Lien)

1. That Plaintiff is a limited liability company properly organized under the laws of the state of South Carolina and actually conducting its business in South Carolina with its principal place of business in Lexington County, South Carolina.

2. That the Defendants. Michael L. Boheler and Jeannette A. Boheler, are upon information and belief, citizens and residents of the Newberry County, South Carolina, and they are the owners in fee simple of real estate in Newberry County more particularly described below; further, that those Defendants contracted directly with the Plaintiff, or had their agent deal with the Plaintiff on their behalf and for their benefit, to build and construct a residence or structure upon their real property in Newberry County which is now subject to and encumbered by the Plaintiff's mechanic's lien.

3. That the Defendant The Palmetto Bank, as assignee for Midlands Mortgage Company, held or holds a mortgage or other financial interest or encumbrance

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upon this real property in Newberry County, but that mortgage and/or encumbrance is junior to and subordinate to the mechanic's lien of the Plaintiff.

4. That the Plaintiff furnished materials and performed labor, and that labor and those materials were actually used in the erection and construction of a building or structure on the subject premises, as reflected on the Affidavit and Statement of Account filed heretofore and previously served upon the Defendants, and the amount of at least **ONE HUNDRED AND SIX THOUSAND ONE AND 63/100 (\$106,001.63) DOLLARS**, is still due and owing the Plaintiff by the Boheler Defendants, together with accrued pre-judgment interest and legal fees incurred since August 22, 2011, which was the date of last payment by those Defendants.

5. That the Plaintiff has fully complied with the agreement between these parties, except to the extent he has been prevented from completion by the Boheler Defendants, and on August 25, 2011 the last materials were furnished and labor performed that was actually furnished and used in the construction and erection of that building or structure on that real property.

6. That since the filing of the Plaintiff's Notice and Certificate of Mechanic's Lien no sums have been paid to the Plaintiff by the Boheler Defendants or anyone else. That the Plaintiff has made demand for payment, but this debt remains unpaid.

7. The real property that is the subject of this action and to which the Plaintiff's mechanic's lien attaches is situated in Newberry County, South Carolina, and has the following legal description:

PROPERTY DESCRIPTION
(6.57 ACRE PARCEL)

All that certain piece, parcel or tract of land with all improvements thereon, if any, situate, lying and being in the County of Newberry, State of South Carolina, being

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shown and delineated as Lot 2 containing 6.57 acres, more or less, on a survey prepared for Norman E. Fisher, Jr. and Michael L. Boheler by Robert Carter Bozard, SCPLS# 19005, dated July 19, 2008 and recorded May 4, 2009 in Plat Book C216 at Page 7 in the Office of the Clerk of Court for Newberry County; and having such metes and bounds as are shown on said plat, this description being in lieu of metes and bounds, as permitted under Section 30-5-250 of the 1976 Code of Laws of South Carolina, as amended.

Together with the right for ingress and egress on the gravel drive to Lot 2 as shown on the above referenced plat, and also with the right to place any utilities, including but not limited to, cable television line, power lines, water lines, sewer lines, telephone lines, or any other utility, with the right to remove any undergrowth from the right-of-way area, and to perform any and all necessary actions to maintain said easement for the purposes stated herein.

DERIVATION: This being the identical property conveyed to Michael L. Boheler and Jeannette A. Boheler by deed of Norman E. Fisher, Jr. and Sarah M. Fisher, dated April 27, 2009 and recorded May 4, 2009 in Record Book 1428 at Page 262, Office of the Clerk of Court for Newberry County, South Carolina.

TAX MAP REFERENCE: TMS# 691-42

PROPERTY ADDRESS: 365 Blackberry Lane, Pomaria, SC.

8. That within 90 days after ceasing to furnish materials and/or labor for the construction and erection of said building or structure on that property, the Plaintiff filed in the Office of the Clerk of Court for Newberry County a Notice and Certificate of Mechanic's Lien and Affidavit and Statement of Account, which documents were filed in the mechanic's lien record book at 2011-LN-36-634 and which documents are incorporated herein by reference; that said Notice and Certificate of Mechanic's Lien and Affidavit and Statement of Account were duly recorded in the Office of the Clerk of Court for Newberry County on September 6, 2011, where they are indexed as provided by law, and that those documents were properly and timely served upon the Defendants. That an Amended Affidavit In Support of Mechanic's Lien was filed by the Plaintiff on September 16, 2011.

9. That this suit for foreclosure of the Plaintiff's mechanic's lien is commenced within six months after the Plaintiff ceased to furnish said labor and

materials for construction and erection of that building or structure on the subject real property in Newberry County, South Carolina, and the Plaintiff believes that it is entitled to have its mechanic's lien foreclosed to pay the indebtedness as set forth herein, pursuant to the provisions of South Carolina Code Section 29-5-10 et. seq., together with a reasonable attorney's fee and prejudgment interest, all as provided by statute.

10. That the Plaintiff is entitled to a determination by the Court of the amount due for the said labor and materials supplied by Plaintiff as described herein, for a judgment upon its debt in the principal sum of at least **ONE HUNDRED AND SIX THOUSAND ONE AND 63/100 (\$106,001.63) DOLLARS**, plus costs, attorney's fees and prejudgment interest, and that the Plaintiff's mechanic's lien be declared a prime lien against the real estate described above and that Plaintiff have judgment of foreclosure of this mechanic's lien against the Defendants herein for the amount found to be due and owing and that the real estate be sold and the proceeds applied to payment of the Plaintiff's debt.

FOR A SECOND CAUSE OF ACTION
(Unjust Enrichment against the Boheler Defendants)

11. That each and every one of the above allegations consistent with this cause of action is re-alleged as if fully repeated herein.

12. That the Plaintiff provided labor and building and other similar materials in conjunction with the Boheler Defendants' construction of a residence in Newberry County as requested and directed by the agent of those Defendants or those Defendants themselves.

13. That the Boheler Defendants were aware that the Plaintiff was providing the labor and building and other similar materials as alleged herein and that the same was

done with the knowledge, approval and consent of the those Defendants.

14. That the Boheler Defendants benefited from the Plaintiff supplying this labor and building and other similar materials as that labor and those items were actually used in the construction of the residence of those Defendants and accepted by them.

15. That there is due and owing to the Plaintiff the amount of at least \$106,001.63 for the labor and materials used in the construction of the residence of the Boheler Defendants and those Defendants have not paid this amount despite demands that they do so after receiving and accepting the benefit of the labor and materials supplied to them by the Plaintiff.

16. That it would be unjust and unfair for the Boheler Defendants to retain the benefit of the use of the labor and materials supplied by the Plaintiff without fully paying the Plaintiff for the same.

17. That the Plaintiff is entitled to judgment against both Boheler Defendants in the amount of at least \$106,001.63, together with prejudgment interest.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract Against the Boheler Defendants)

18. That each and every one of the above allegations consistent with this cause of action is re-alleged as is fully repeated herein.

19. That the Boheler Defendants entered into a written agreement with the Plaintiff for the construction of a residence on their property in Newberry County as described above and that agreement was dated April 30, 2010, but not ratified and accepted by all parties until construction started later that year.

20. That the Plaintiff has provided labor and materials for the residence being built by the Boheler Defendants pursuant to the terms and conditions of that agreement,

and in light of certain modifications and changes requested by the Boheler Defendants from time to time subsequent to the execution of that agreement.

21. That the Plaintiff is owed at least \$106,001.63 by the Boheler Defendants for labor and materials supplied under that agreement and in light of the changes and modifications requested by the Boheler Defendants subsequent to the execution of that agreement.

22. That the Plaintiff has made multiple demands upon the Boheler Defendants for payment of this amount, but has not been successful.

23. That the Plaintiff has in good faith satisfied all conditions precedent for the collection of this debt arising from that agreement except to the extent the Plaintiff has been prevented from complete performance by the Boheler Defendants, and the Boheler Defendants, upon information and belief, are entitled to no setoff, credit, or otherwise entitled to any reduction in the amount claimed.

24. That the Plaintiff requests an award of actual damages against the Boheler Defendants in an amount of at least \$106,001.63 as direct and proximate result of the breach of this agreement by those Defendants, reflecting the amount due under that agreement as of August 22, 2011, in consideration of the original amount together with the subsequently made changes and modifications of the Boheler Defendants, plus pre-judgment interest since that date, the court costs related to this action to include the filing fee and service charges.

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WHEREFORE, having fully complained against the Defendants as stated in the above Complaint, the Plaintiff requests that it be awarded the relief requested herein along with such further and other relief the Court may deem appropriate.

KENNEDY LAW FIRM, LLC

BY: Robert M. Cook II
ROBERT M. COOK II
Attorney for Plaintiff
P.O. Box 2559
Batesburg-Leesville, SC 29070
803/532-4100 (phone)
803/532-0909 (fax)
robcook1965@yahoo.com

February 21, 2012

COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF NEWBERRY	)	CIVIL ACTION NO. 2012-CP-36-00090
Terlizzi Home Improvement, LLC,	)	
	)	
Plaintiff,	)	
vs.	)	ANSWER COUNTERCLAIM AND
Michael L. Boheler, Jeannette A. Boheler,	)	THIRD PARTY CLAIMS OF MICHAEL L.
and The Palmetto Bank as Assignee of	)	BOHELER AND JEANNETTE A. BOHELER
Midlands Mortgage Corp.,	)	
vs.	)	Jury Trial Requested
William Terlizzi	)	
	)	
Defendants.	)	
	)	

I. ANSWER AND COUNTERCLAIMS

Defendants Michael L. Boheler and Jeannette A. Boheler (hereinafter referred to collectively as "Defendants" or "Boheler") by and through their undersigned Attorneys file their Answer and Counterclaims to the Complaint. With respect to the allegations, Defendants answer as follows:

FOR A FIRST DEFENSE

Defendants deny each and every allegation and any inferences contained in the Complaint unless hereinafter specifically admitted, qualified or otherwise answered.

1. Defendants admit that Terlizzi Home Improvement, LLC ("THI") is a limited liability company listed with the South Carolina Secretary of State's office as being a domestic South Carolina limited liability company. Defendants have no knowledge of the

remaining allegations made in Paragraphs 1 of the Complaint therefore deny same, and demands strict proof thereof.

2. Defendants deny that they are citizens and residents of Newberry County, South Carolina but are residents of Richland County South Carolina and are the owners of the Property (the "Property") described in the Complaint. Defendants further admit that they contracted with the Plaintiff by and through its agent John Harding for the construction of a residence on the Property in Newberry County. Plaintiff denies that that Property is encumbered by any mechanics lien as such lien has been bonded off pursuant to S.C. Code Ann. § 29-5-110. (Attached hereto as Exhibit A). Defendants deny any of the remaining allegations of Paragraph 2 of the Complaint.
3. In response to Paragraph 3 of the Complaint, Defendants admit that The Palmetto Bank holds a mortgage on the Property, but denies that the Property is encumbered by the mechanic's lien as it has been bonded off pursuant to § 29-5-110. As such Defendants deny that the mortgage held by The Palmetto Bank is subordinate to any interest of the Plaintiff.
4. Defendants deny the allegations contained in Paragraphs 4 and 5 of the Complaint.
5. In response to Paragraph 6 of the complaint, Defendants admit that they have made no payments to the Plaintiff since the filing of the mechanic's lien. Defendants have no knowledge as to payments from any other source and must therefore deny such allegations and demand strict proof thereof.
6. While Defendants admit that the Property described in Paragraph 7 is the Property owned by Defendants, Defendants deny that the mechanic's lien encumbers the Property as it has been bonded off pursuant to § 29-5-110.

7. Defendants admit that portion of Paragraph 8 in that certain Notices and Affidavits were filed with the Clerk of Court for Newberry County and that the timing and service of same is a matter of record which speaks for itself. Defendants deny any other implications or allegations in Paragraph 8 and demand strict proof thereof.
8. Defendants admit that Plaintiff has filed an action for the foreclosure of a mechanic's lien pursuant to South Carolina Code Section § 29-5-10. Defendants deny all the remaining allegations of Paragraph 9. Further Defendants would state that the mechanics lien no longer encumbers the Property as it has been bonded off pursuant to § 29-5-110.
9. Defendant denies the allegations of Paragraph 10.
10. Paragraph 11 is a reassertion of previous allegations and as such requires no response. In the event a response is necessary. Defendants reassert their responses previously made in this Answer.
11. Defendants admit that Plaintiff provided labor and materials in conjunction with the construction of a residence on Defendant's property. All other allegations of Paragraph 12 are denied.
12. The Defendants admit that they were aware that Plaintiff was providing labor and materials for the construction of a residence on their property. All other allegations of Paragraph 13 are denied.
13. Defendants deny the allegations of Paragraphs 15 through 17.
14. Paragraph 18 is a reassertion of previous allegations and as such requires no response. In the event a response is necessary Defendants reassert their responses previously made in this Answer

15. In response to Paragraph 19, Defendants admit that they entered into an agreement dated April 30, 2010. Defendants do not know what Plaintiff is referring to as a subsequent ratification and acceptance so they must deny such allegations and demand strict proof thereof.
16. Defendants admit that Plaintiff has provided labor and material for the residence, but deny all other allegations of Paragraph 20.
17. Defendants deny the allegations of Paragraph 21.
18. In response to Paragraph 22 Defendants deny that any demand for payment of \$106,001.63 was made prior to the filing of the mechanics lien. Upon information and belief the mechanic's lien remains the only demand made upon Defendants.
19. Defendants deny the allegations of Paragraphs 23-24.

FOR A SECOND DEFENSE
(Accord and Satisfaction)

20. Plaintiff's claims are barred by accord and satisfaction. Defendants have paid Plaintiff an amount more than the contractual value of the work performed on the home.

FOR A FOURTH DEFENSE
(Laches)

21. Plaintiff's claims are barred by the doctrine of laches by virtue of the Plaintiff's excessive delay in bringing this claim.

FOR A THIRD DEFENSE
(Fraud)

22. Plaintiff fraudulently filed a mechanic's lien in the claiming more than it is due.
23. Plaintiff knowingly and intentionally made materially false statements regarding the amount owed by Defendants.
24. These fraudulent statements have resulted in actual and proximate damage to Defendants.

FOR A FIFTH DEFENSE
(Misrepresentation)

25. Plaintiff falsely represented John Harding out to be its agent.
26. Through its agent Plaintiff misrepresented to the Bohelers the extent of work to be done for the construction of the home promising among other things, a barn, a dock, a fence and a generator.
27. Plaintiff made these promises in order to induce the Defendants to execute the agreement.
28. Plaintiff knew that it did not intend to construct these extra items but used them to induce the Bohelers into signing a contract.
29. The Bohelers were ignorant of the falsity of the promises.
30. Defendants reasonably relied upon this material misrepresentation and have consequently suffered actual and proximate damage.

FOR A SIXTH DEFENSE
(Mistake)

31. Plaintiff's claims are barred by the doctrine of mistake.

FOR A SEVENTH DEFENSE
(Payment)

32. Plaintiff's claims are barred by fulfillment of payment by Defendants.
33. Defendants had a written contract with Plaintiffs for a fixed amount which has been paid in full.

FOR AN EIGHTH DEFENSE
(Unclean Hands)

34. Plaintiff's claims are barred by the doctrine of unclean hands.

35. Plaintiff has acted fraudulently and in bad faith in the inducement of the contract, in constructing the home, in filing the mechanic's lien and subsequently bringing this action.

36. Plaintiff's claims for unjust enrichment are therefore barred.

FOR A NINTH DEFENSE
(Violation of SC Code Ann. § 29-5-100)

37. Plaintiff's claims for enforcement of mechanic's lien are in violation of S.C. Code Ann. § 29-5-100. Plaintiff willfully and knowingly claimed more than his due therefore invalidating this action.

FOR A TENTH DEFENSE
(Failure to Properly File Mechanic's Lien)

38. Plaintiff failed to properly file the mechanic's lien in question, specifically failing to adhere to the requirements of Title 29 Article 5 of the South Carolina Code of Laws.

FOR AN ELEVENTH DEFENSE
(Failure to state a Cause of Action)

39. The Complaint fails to state facts sufficient to constitute a cause of action upon which relief can be granted against Defendant and therefore should be dismissed.

FOR A TWELTH DEFENSE
(Contract and Breach of Contract)

40. Plaintiff's claim in equity is barred as this is an action that lies in contract.

41. Defendants contracted with the Plaintiff by and through its agent John Harding for the construction of a residence on the Property.

42. The terms of the contract which was drafted by Plaintiff are clear and unambiguous and state that any changes or additions in construction were to be made in writing and signed by both parties.

43. The contract clearly states that such changes shall be paid for before the work is started.

44. As the change orders were subject to a clear contractual terms Plaintiff's unjust enrichment claims are barred.

FOR A THIRTEENTH DEFENSE
(Lack of Consideration)

45. Plaintiff's claim for any agreement for the payment of additional funds beyond the initial contract is barred for lack of consideration.

FOR A FOURTEENTH DEFENSE
(Express or Apparent/Implied Agency/intervention of third party)

46. John Harding was the express or implied agent of the Plaintiff.

47. Plaintiff through its actions and direct statements has held forth John Harding to the Bohelers as its agent.

48. Defendants justifiably relied on such representation to their detriment.

49. Any and all damages, change orders or other additional charges suffered by Plaintiff were as a result of the actions of its agent John Harding and not by the Bohelers.

50. As a result Plaintiff's action if any lies with and against its agent John Harding.

COUNTERCLAIMS AND THIRD PARTY CLAIMS

Defendants Michael L. Boheler and Jeannette A. Boheler (hereinafter referred to collectively as "Defendants") by and through their undersigned Attorneys file their Counter Claims and Third Party Claims against Plaintiff and William J. Terlizzi (hereinafter "Terlizzi") collectively THI and Terlizzi may collectively be referred to as "Contractors"). Defendants would allege the following:

51. Terlizzi is, upon information and belief, a citizen and resident of Richland County, South Carolina and the president of THI.
52. THI and Terlizzi through their agent, John Harding, contracted to construct a home for Defendants on the Property in Newberry County.
53. That Terlizzi is the qualifying licensed residential home builder for THI.
54. THI had a working relationship with John Harding prior to entering into the contract with the Bohelers.
55. THI and Terlizzi had an agreement with John Harding that the Boheler residence would be constructed under THI's name and license with John Harding being in charge of the construction of the home.
56. Mr. Harding would construct the home as an agent of THI and THI would be entitled to ten percent (10%) of the contract price.
57. Terlizzi understood that his residential construction license would be the qualifying license for the construction of the Boheler home.
58. THI accepted all payments distributed from the Bohelers' construction loan.
59. At the time of the execution of the contract the only contact that the Bohelers had with THI was through John Harding.
60. The Contractor's Agreement ("Contract") was drafted by Terlizzi and signed by Terlizzi on behalf of THI, but presented to the Bohelers by John Harding.
61. The residence was to be constructed for a fixed price of Two Hundred and Twenty-Five Thousand Dollars (\$225,000.00).

62. In reliance upon the Contract, the Bohelers obtained a construction loan for Two Hundred and Twenty-Five Thousand Dollars (\$225,000.00) from Midlands Mortgage/Palmetto Bank for the construction of the home.
63. According the terms of the Contract, any alteration or deviation from the Specifications or change orders had to be contained in writing and signed in advance by THI and the Bohelers.
64. According to the Contract, change orders as well as any hidden or unknown contingencies had to be agreed to by the parties and paid for prior to the work commencing.
65. According to the Contract, the residence was to be substantially completed by December 1, 2010.
66. At all times relevant to this action Mr. Harding held himself out as an agent of THI to the Bohelers.
67. From the beginning of contract negotiations with THI up through May of 2011, Mr. Harding was the only contact that the Bohelers had with THI.
68. The Contract terms require that the Bohelers pay a deposit of twenty two thousand, five hundred dollars (\$22,500.00) to get construction started.
69. It was understood by the parties that draws from the Bohelers' construction loan would begin after a certain amount of progress was completed on the home.
70. The deposit paid by the Bohelers would be used to fund the costs of construction on the residence until the initial draw from the construction loan could be made.

71. The Bohelers paid to John Harding thirty six thousand, three hundred and eighty three thousand dollars (\$36,383.00) as a deposit toward the construction of the home. Of that deposit, ten thousand dollars (\$10,000.00) was eventually returned to the Boehers.
72. The deposit money paid to John Harding was used to fund the initial costs of construction until the first draw was made from the construction loan.
73. In addition, the Bohelers directly paid various other costs which were the responsibility of THI including but not limited to costs for plans, permits, builder's risk insurance, water and electric for construction site, appliances, materials, equipment and labor.
74. Over the course of the job, THI accepted draws from the Boheler construction loan in the amount of one hundred and ninety thousand, eight hundred and seventy five dollars (\$190,875.00).
75. When the home had not been substantially completed by May of 2011, the Bohelers demanded that Mr. Terlizzi take over construction from John Harding.
76. When Mr. Terlizzi took over construction of the residence he had conversations with the Bohelers and Keith Meyers regarding the money paid directly to John Harding.
77. In May of 2011 Mr. Boheler gave to Terlizzi an up to date accounting of construction payments made by the Bohelers that included the money paid directly to John Harding and discussed it with Mr. Boheler and Keith Meyer.
78. John Harding gave all of his receipts and invoices from the job to Terlizzi including those documenting costs that were paid by the deposit money.
79. From May, 2011 until approximately August 2011, Terlizzi was THI's primary agent at the Boheler residence. During this time John Harding continued to work for THI at the Boheler residence.

80. In June of 2011 Terlizzi told the Bohelers that the home could not be completed for the amount left in the construction loan and threatened to walk off the job.
81. At this point the Bohelers were still due repayment for their deposit paid to THI from the Construction loan.
82. Knowing that THI had placed them in a position that they would not have enough money to complete their home with a new contractor, the Bohelers reluctantly agreed to potentially forego their recovery of the deposit from the construction loan in order to keep THI on the job.
83. No new consideration was given by THI for this new agreement.
84. The new agreement was contingent on THI completing the home by August 24, 2011 and the final draw being made at closing after the home was substantially completed.
85. THI walked off the job on August 23, 2011 with no chance of completing the home by the August 24, 2011 date or for the contracted amount.
86. Upon information and belief despite having no written and signed change orders, Mr. Terlizzi approached John Harding to discuss what he might be able to claim as "extras and change orders" on the Boheler residence.
87. Upon information and belief Mr. Terlizzi attempted to coerce John Harding into claiming improper and undocumented extras and change orders in order to force the Bohelers to pay THI money to which it was not contractually entitled.
88. Upon information and belief, Mr. Terlizzi explained to Mr. Harding that "if they stuck together" the Bohelers would not be able to defend themselves from THI's improper and undocumented claims.

89. Upon information and belief, Mr. Terlizzi explained to John Harding that Terlizzi believed that the Bohelers had their life savings invested in the home and could not afford a new contractor to finish the house or a lawyer to defend them from the improper and undocumented extras and change orders.
90. Upon information and belief, Terlizzi explained to John Harding that if they could claim enough extras and change orders the Bohelers would not be able to pay off a lien, construction would stop and the Bohelers would have to pay THI money to which it was not contractually entitled.
91. Upon information and belief John Harding told Terlizzi that there were no extras or change orders that THI could charge against the Bohelers.
92. Upon information and belief, John Harding told Terlizzi that any changes made on the residence were as a result of John Harding's interpretation of THI's obligations under the Contract and not as a result of any request of the Bohelers.
93. Upon information and belief John Harding told Terlizzi that he would not be a part of Terlizzi's scheme against the Bohelers.
94. Thereafter John Harding ceased working with THI.
95. At the time that THI ceased working on the Boheler residence, the Bohelers had paid directly to THI and John Harding payments in the amount of two hundred and twenty-one thousand, sixty seven dollars and seventy three cents. \$221,067.73 of the Two Hundred and Twenty-Five Thousand Dollars (\$225,000.00) contract price, and the home was not substantially completed.

96. In addition, at the time that THI ceased working on the Boheler residence; the Bohelers had directly paid many other additional expenses that were the contractual responsibility of THI.
97. Despite not having a single written change order and despite John Harding's insistence that there were no extras which the Bohelers were responsible, THI, through a sworn affidavit of its agent Terlizzi, filed a mechanics lien on the Boheler property in the amount of one hundred and six thousand, one dollar and thirteen cents (\$106,001.13).
98. Specifically omitted from THI's claim under the lien was acknowledgement of the payment of the deposit which Terlizzi knew had been paid to THI's agent John Harding.
99. Upon information and belief Terlizzi, in his affidavit specifically included charges for "changes in plans" extras and change orders for which he knew THI was not entitled or to which THI had incurred no costs for materials and/or labor.
100. In order to complete construction, the Bohelers were forced to borrow money to bond off the lien and are currently incurring interest costs as a result.

FOR A FIFTEENTH DEFENSE BY WAY OF COUNTERCLAIM AS TO THI
(Breach of Contract)

101. Plaintiff has materially breached the contract entered into with Defendants for the construction of a residence on the Property.
102. Plaintiff materially breached said contract in failing to complete construction in a timely manner and for the contracted amount.
103. Plaintiff breached the contract by installing improper and inferior products to those promised.

104. Plaintiff breached the contract by failing to construct all of the items promised to the Bohelers.

105. Plaintiffs breached the contract by abandoning the job, announcing its decision to quit, destroying existing work and attempting to induce other contractors to abandon construction.

106. This breach has resulted in actual and proximate damage to Defendants.

**FOR A SIXTEENTH DEFENSE BY WAY OF COUNTERCLAIM AS TO THI AND
THIRD PARTY CLAIM AS TO TERLIZZI**
(Fraud)

107. In abandoning the construction of the Bohelers' home THI breached the Contract

108. Terlizzi knew at the time of the breach that it would not be able complete the home pursuant to the contract price.

109. Plaintiff's agent John Harding had been working on the residence from the beginning of construction.

110. THI and Terlizzi knew that Mr. Harding had received money directly from the Bohelers to begin construction of the home.

111. Upon information and belief Mr. Harding provided to Plaintiff receipts for material and labor for work done on the residence from money given to him directly from the Bohelers.

112. Upon information and belief Terlizzi had discussed and acknowledged these payments with the Bohelers and others.

113. When Terlizzi decided to abandon the job he attempted to persuade its agent John Harding to commit fraud by asking him to agree to charge the Bohelers for change orders they had not been agreed to.

114. Upon information and belief Mr. Harding informed Terlizzi that there were no change orders or extras to which the Bohelers were responsible.
115. Knowing of its falsity, Terlizzi filed a mechanic's lien and accompanying affidavit seeking payment for change orders and extras he knew were improper and false.
116. Relying upon the affidavit of Terlizzi the Bohelers were forced to tell their bank of the lien.
117. Relying upon the affidavit of Terlizzi Palmetto Bank ceased the funding of the construction loan causing construction to halt while the costs for interest continued.
118. THI and Terlizzi knowingly and intentionally filed an unfounded and frivolous mechanic's lien containing materially false statements as to the amount owed by Defendants.
119. THI and Terlizzi's fraudulent action has resulted in actual and proximate damage to Defendants.

FOR A SEVENTEENTH DEFENSE BY WAY OF COUNTERCLAIM AS TO THI AND
THIRD PARTY CLAIMS AS TO TERLIZZI
(Breach of Contract Accompanied by a Fraudulent Act)

120. In abandoning the construction of the Bohelers' home and failing to build it within budget THI breached the Contract.
121. Upon information and belief, THI and Terlizzi knew or should have known at the time of the breach that it would not be able to complete the home pursuant to the contract price.
122. Upon information and belief THI and Terlizzi knew if it abandoned the job, that the Bohelers would not be able to complete the home within the amount remaining in the construction loan.

123. THI and Terlizzi knew that the Bohelers had not agreed to any written change orders in accordance with the Contract.
124. Upon information and belief THI and Terlizzi abandoned the job believing that the Bohelers would not have the money to complete the home with a new contractor and would be forced to renegotiate the contract with THI.
125. Upon information and belief THI and Terlizzi breached the contract with the intent that it would force the Bohelers to agree to pay for change orders and extras that they had not agreed to in accordance with the Contract.
126. Upon information and belief the THI and Terlizzi breached the contract with the intent that it would file an improper lien stopping the funds from the construction loan.
127. Upon information and belief Terlizzi believed that the Bohelers could not bond off and as such force the Bohelers to agree to pay for change orders and extras that were improper and to which they were not obligated to pay.
128. This breach and fraudulent acts have resulted in actual and proximate damage to Defendants.

FOR AN EIGHTEENTH DEFENSE BY WAY OF COUNTERCLAIM
(Misrepresentation)

129. In inducing the Bohelers to enter into the construction agreement THI through its agent John Harding represented that the agreement would include many extra items including but not limited to a barn, a fence, a generator and a dock.
130. In inducing the Bohelers to enter into the construction agreement THI through its agent John Harding represented that the agreement included an energy star rated home

that was handicapped accessible including a handicapped tub and other various items that are generally held to be standard in the industry for a home of its size and cost.

131. THI knew at the time that it did not intend to include these items in the construction of the residence.

132. The representation was material to the Bohelers' decision to hire THI.

133. The Bohelers were ignorant of the falsity of the statement and relied upon it to their detriment as THI refused to construct the home as promised.

134. As a result of the misrepresentation the Bohelers' suffered real and consequential damages

FOR A NINETEENTH DEFENSE BY WAY OF THIRD PARTY CLAIM AS TO
TERLIZZI

(Intentional Infliction of Emotional Distress/Outrage)

135. In filing an improper lien and associated affidavit THI and, Terlizzi knew or should have known that the lien would cause the funding of the construction loan to cease.

136. Upon information and belief Terlizzi purposefully inflated the lien because he believed that the Bohelers did not personally have the funds required to bond off the lien and would be unable to continue construction of the residence.

137. Upon information and belief, Terlizzi believed that the improper and inflated lien would subject the Bohelers' property to foreclosure and force the Bohelers to pay him additional money to which he was not entitled.

138. In so doing Terlizzi knowingly and recklessly inflicted severe emotional distress on Defendants or was substantially certain that such distress would result from his actions.

139. This conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized society.

140. As a result of Terlizzi's actions the Bohelers have suffered severe emotional distress and other actual and consequential damages.

FOR A TWENTITH DEFENSE BY WAY OF COUNTERCLAIM AS TO THI
(Interference with a Contractual Relationship)

141. Plaintiff has tortuously interfered with a contractual relationship between Defendants and The Palmetto Bank.

142. Plaintiff knew or should have known that the Lien which is the subject of this action is no longer valid as it has been bonded off pursuant to S.C. Code Ann. § 29-5-110

143. Plaintiff, knowing of a contract between Defendants and The Palmetto Bank, unjustifiably named The Palmetto Bank as a defendant to this suit resulting in a strained relationship between The Palmetto Bank and the Defendants.

144. Plaintiff's tortious interference has resulted in actual and proximate damage to Defendants.

FOR A TWENTY FIRST DEFENSE BY WAY OF COUNTERCLAIM AS TO THI
(Unfair Trade Practices Act Violation)

145. Plaintiff has committed an unfair and deceptive trade practice in violation of S.C. Code Ann. § 39-5-20.

146. THI intentionally misrepresented to the Bohelers that John Harding was an agent of THI and used him to induce the Bohelers to enter into a construction agreement.

147. THI agreed to allow John Harding to construct the home without proper supervision despite the fact that he was not a licensed residential contractor.

148. THI entered into an agreement knowing that it did not intend to fulfill the obligations under the Agreement but instead would hold the Bohelers hostage for additional money at the end of the job by filing an inflated and improper mechanic's lien.
149. Plaintiff filed a fraudulent and unfounded mechanic's lien in an attempt to force Defendants into paying Plaintiff more than was contracted for or needed to complete construction.
150. Upon information and belief these course of dealings are a regular business practice of THI and the actions are capable of repetition.
151. Defendants have suffered actual and proximate damages as a result of Plaintiff's conduct and are eligible for recovery resulting from Plaintiff's violations pursuant to S.C. Code Ann. § 39-5-140.

**FOR A TWENTY SECOND DEFENSE AND BY WAY OF COUNTERCLAIM AS
TO THI AND THIRD PARTY COMPLAINT AS TO TERLIZZI**
(Negligence/Improper Supervision)

152. When THI took on the obligation of constructing the Bohelers' residence, they undertook the duty to ensure that the contractors, subcontractors and agents would construct the home properly, timely and within the contract price.
153. Terlizzi was the qualifying residential contractor for THI and had the personal duty to ensure that all agents, contractors and subcontractors working on the Boheler residence were properly supervised.
154. THI breached that duty when it failed to properly supervise its agent John Harding.

155. As a result of the THI's breach, the Bohelers have suffered damages in that the home was not constructed timely, inferior materials were used in construction and the money was poorly budgeted and they have suffered actual and consequential damages.

**FOR A TWENTY THIRD DEFENSE BY WAY OF COUNTERCLAIMS AGAINST
THI AND THIRD PARTY COMPLAINT AGAINST TERLIZZI**
(Conversion)

156. When THI entered into an agreement it was paid moneys from the Bohelers and Palmetto Bank for the construction of a residence. As such it was legally in possession of the Bohelers' money and materials that were purchased with that money.
157. The Bohelers had an interest in that money along with materials purchased with that money which were to be used to construct their residence.
158. Terlizzi, as President of THI and John Harding as THI's agent had sole control of the funds and materials purchased with the funds.
159. Upon information and belief, THI and Terlizzi converted the money and materials to their own use by using them on other jobs, removing them from the jobsite and funding other jobs and personal expenses of THI and Terlizzi without the permission of the Bohelers.
160. As a result the Bohelers have suffered actual and consequential damages.

**FOR A TWENTY FOURTH DEFENSE BY WAY OF COUNTERCLAIMS
AGAINST THI AND THIRD PARTY COMPLAINT AGAINST TERLIZZI**
(Abuse of Process)

161. Upon information and belief, THI and Terlizzi knew that the amount of money they sought in filing their mechanic's lien and this foreclosure action was in excess of what they were due.

162. Upon information and belief, in filing the improper lien THI and Terlizzi believed that the Bohelers would be unable to afford to remove the lien or fight the lien and the construction would come to a halt.
163. Upon information and belief, in filing the improper lien and this foreclosure action THI and Terlizzi had the ulterior motive of halting construction of the Boheler residence and preventing them from completing construction rather than seeking money that was actually due.
164. THI and Terlizzi's use of the mechanic's lien process was willful and improper and caused the Bohelers actual and consequential damages.

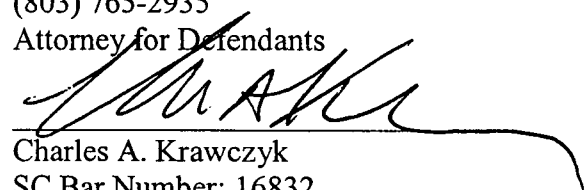
RELIEF REQUESTED

WHEREFORE, the Defendants having fully responded to the Complaint of the Plaintiff would respectfully pray that this Court issue its order:

- a. Dismissing the Complaint and the lien with prejudice;
- b. Dismissing and releasing the bond being held by the court in favor of the Defendants
- c. Awarding the Defendant emotional, physical, actual, proximate, and consequential damages in an amount provable at trial;
- d. Awarding punitive damages authorized by law and in amount provable at trial;
- d. Awarding Defendants' attorney's fees and costs;
- e. For other such relief as this Court deems just and equitable.

Respectfully submitted.

FINKEL LAW FIRM, L.L.C.
1201 Main Street, Suite 1800
Post Office Box 1799
Columbia, South Carolina 29202
(803) 765-2935
Attorney for Defendants



Charles A. Krawczyk
SC Bar Number: 16832

Columbia, South Carolina
March 22, 2011

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS

C.A. No. 2012-CP-36-00090

Terlizzi Home Improvement, LLC,)

Plaintiff,)

vs.)

Michael L. Boheler, Jeannette A.)
Boheler and The Palmetto Bank)
as assignee of Midlands Mortgage)
Corp.,)

vs.)

WILLIAM TERLIZZI,)

Defendants.)

PLAINTIFF'S REPLY TO COUNTER-
CLAIMS OF THE BOHELER
DEFENDANTS AND ANSWER OF
WILLIAM TERLIZZI TO THIRD PARTY
COMPLAINT OF THE BOHELER
DEFENDANTS

FILED
NEWBERRY COUNTY
2012 APR 13 A 10:28
CLERK OF COURT

The Plaintiff Terlizzi Home Improvement, LLC, by way of its reply to the counter-claims of the Boheler Defendants, and William Terlizzi by way of answer as third-party Defendant, would show as follows:

FOR A FIRST REPLY

1. The counter-claims against the Plaintiff and the third party claims against William Terlizzi fail to state facts sufficient to support any of the causes of action alleged against those parties, are otherwise legally insufficient and should be dismissed per Rule 12(b)(6), SCRPC.

FOR A SECOND REPLY

2. That all of the causes of action alleged against the Plaintiff not sounding in contract are barred as a result of a mutually binding contract between those parties and the remedy of the Boheler Defendants, if any, is limited to a contract recovery only and

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those other non-contractual claims for fraud, misrepresentation, intentional infliction of emotional distress, interference with contractual relationship, unfair trade practices, negligence, conversion and abuse of process, should be dismissed pursuant to Rule 12(b)(6), SCRCP, or otherwise; further that the contractual remedy bar to these non-contractual claims applies with equal force and effect to William Terlizzi as the sole member of the Plaintiff limited liability company.

FOR A THIRD REPLY

3. That the Plaintiff denies each and every affirmative defense pled by the Boheler Defendants and puts those Defendants to strict proof thereof.

FOR A FOURTH REPLY

4. That the Plaintiff and William Terlizzi deny each and every allegation in the answer, counter-claims and third party complaint not hereinafter specifically admitted, qualified or explained.

5. That paragraphs 1 through 50 constitute the answer of those Defendants to the Complaint of the Plaintiff and require no response, but the Plaintiff and William Terlizzi deny all of those allegations to the extent that can be construed to assert: (a) that the Plaintiff's mechanic's lien is not valid or enforceable, (b) that the Plaintiff is not entitled to recover from those Defendants as alleged in the Complaint, or (c) that the Plaintiff and/or William Terlizzi acted wrongfully or are legal liable to those Defendants in any manner.

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6. Paragraph 51 is admitted subject to the assertion that William Terlizzi is a resident of Lexington County and not Richland County.
7. Paragraph 52 is admitted as to the contract, but denied as to the agency of John Harding.
8. Paragraph 53 is admitted.
9. Paragraph 54 is admitted only to the extent that from time to time John Harding was an occasional employee and sub-contractor for the Plaintiff, depending on the circumstances, and there were frequent lengthy gaps of time when there was no relationship.
10. Paragraph 55 is generally admitted, but the Plaintiff denies that John Harding was its agent for the contract or for receipt of payment; further, that the Plaintiff later assumed control of the construction of the residence at the request of the Bohelers.
11. Paragraph 56 is denied.
12. Paragraph 57 is admitted.
13. Paragraph 58 is generally admitted upon information and belief, but the Plaintiff and William Terlizzi are informed and believe that the Bohelers made certain payments directly to John Harding outside of the contract and now claim an entitlement to use those payments as part of their full payment defense, which the Plaintiff denies.
14. Paragraph 59 is denied as stated.
15. Paragraph 60 is admitted.
16. Paragraph 61 is admitted, but the Plaintiff and William Terlizzi would show that the contract amount originally agreed to was based upon a set of house plans that was

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later changed, increasing the cost of constructing the residence and thereby increasing the contract amount which increase was understood and agreed to by the Bohelers.

17. The Plaintiff and William Terlizzi cannot admit or deny paragraph 62 as stated and therefore denies the same and puts those Defendants to strict proof thereof.

18. With regard to paragraphs 63 to 65, the Plaintiff and William Terlizzi respond by stating the written contract documents speak for themselves and crave reference thereto.

19. Paragraph 66 is denied in that John Harding was not the Plaintiff's agent, but the Plaintiff and William Terlizzi otherwise lack information sufficient to form a belief as to how John Harding held himself out to others, and therefore deny the same and puts the Bohelers to strict proof thereof.

20. Paragraph 67 is denied to the extent it can be construed to alleged that contact with John Harding was the equivalent of contact with THI, but the Plaintiff and William Terlizzi do admit that William Terlizzi had no direct contact with the Bohelers until approximately around the time alleged.

21. In response to paragraphs 68 and 69 the Plaintiff and William Terlizzi assert that the written contract documents speak for themselves and crave reference to the same.

22. The Plaintiff and William Terlizzi lack knowledge and information sufficient to form a belief as to the truth of the assertions in paragraph 70 and therefore deny the same and put the Bohelers to strict proof thereof.

23. Paragraph 71 is admitted, upon information and belief, only to the extent it can be construed to allege that the Bohelers paid certain sums to John Harding outside of their contract with the Plaintiff.

24. The Plaintiff and William Terlizzi lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraphs 72 and 73 and therefore deny the same and put the Bohelers to strict proof thereof.

25. Paragraph 74 is admitted.

26. Paragraph 75 is generally admitted, but the Plaintiff and William Terlizzi would show that the Bohelers asked, rather than demanded, that THI take over construction from John Harding.

27. Paragraphs 76, 77 and 79 are admitted.

28. Paragraphs 78, and 80 to 82 are denied.

29. The Plaintiff and William Terlizzi deny there was a new agreement as alleged in paragraph 83 and 84, but admit that the Bohelers agreed to pay for the extras and verbal change orders they previously requested and that resulted from the changed plans as shown by the attached Exhibit A.

30. Paragraph 85 is denied because the Plaintiff was wrongfully fired by the Bohelers and did not walk off the job as alleged.

31. That paragraph 86 is denied as stated and paragraphs 87 through 93 are denied.

32. Paragraph 94 is denied to the extent it can be construed to allege there was a scheme involved in which Harding refused to participate, but it is admitted that Harding stopped working at some point.

33. With regard to paragraph 95 the Plaintiff and William Terlizzi only admit that the Plaintiff received \$190,875.00 from the Bohelers.

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34. Paragraph 96 is generally denied, but the Plaintiff and William Terlizzi are informed and believe that the Bohelers may have voluntarily elected to pay some utility costs and the initial builders' risk insurance premium.
35. Paragraph 97 and 98 are responded to by reference to the filed mechanic's lien itself and the attached Exhibit A and with the assertion that John Harding was not the Plaintiff's agent for receipt of those alleged payments.
36. Paragraph 99 is denied.
37. Paragraph 100 is admitted as to the fact of the bond only as the Plaintiff and William Terlizzi cannot respond to the allegation of the source of the funds for the bond.
38. That paragraphs 101 to 106 are denied.
39. Paragraphs 107 and 108 are denied.
40. Paragraph 109 is denied as John Harding was not the Plaintiff's agent.
41. Plaintiff and William Terlizzi cannot answer paragraph 110 because there is no reference as to when the Plaintiff is alleged to have known of such payments. The Plaintiff and William Terlizzi do not deny that they know of those payments now, but deny that they knew of the payments when made by the Bohelers.
42. Paragraphs 111, and 113 to 115 are denied outright and paragraph 112 is denied as stated as the Plaintiff and William Terlizzi have never acknowledged that any alleged payments to John Harding were made pursuant to the parties' contract.
43. That the Plaintiff and William Terlizzi lack knowledge and information sufficient to form a belief as the truth of paragraphs 116 and 117 and therefore deny the same and put the Bohelers to strict proof thereof.

44. Paragraphs 118 to 128 are denied and Exhibit A is referred to in response to the allegations of paragraph 123.

45. Paragraphs 129 to 134 are denied and the Plaintiff and William Terlizzi would affirmatively show that John Harding was not an agent as alleged in paragraphs 129 and 130.

46. That paragraphs 135 to 140 relate to a claim not involving the Plaintiff and require no direct response by the Plaintiff, but to the extent those paragraphs could be construed to assert allegations against the Plaintiff they are denied; further, that William Terlizzi denies those paragraphs.

47. That paragraphs 141 to 151 are denied but the Plaintiff and William Terlizzi do admit that the Plaintiff is a home-builder by trade and the Plaintiff and William Terlizzi would further show that neither of them, or their counsel, were aware the Plaintiff's mechanic's lien had been bonded off by the Bohelers as alleged in paragraph 142 until after the foreclosure suit was filed and that upon learning of that bonding off of that lien the Plaintiff filed a real property lien release with the Court on March 21, 2012.

48. That paragraphs 152 to 160 relate to claims not involving the Plaintiff and require no direct response by the Plaintiff, but to the extent those paragraphs could be construed to assert allegations against the Plaintiff they are denied; further that William Terlizzi denies those paragraphs.

49. That paragraphs 161 to 164 are denied.

FOR A FIFTH REPLY

50. That the Plaintiff and William Terlizzi would show that the filing and prosecution of the within mechanic's lien action is privileged and cannot form the basis of a claim for

abuse of process and that cause of action should be dismissed as a result per Rule 12(b)(6), SCRCP.

FOR A SIXTH REPLY

51. That the cause of action for interference with a contractual relationship as alleged in paragraphs 141 to 144 is both factually and legally insufficient and as a matter of law there can be no cause action against the Plaintiff for merely filing its mechanic's lien and foreclosing the same and this cause of action should be dismissed as a result per Rule 12(b)(6), SCRCP, when the Plaintiff's action only named the Defendant mortgage holding bank as a defendant due to its mortgage on the real estate but otherwise asserted no claim against that bank,

FOR A SEVENTH REPLY

52. That by way of defense to the breach of contract claim the Plaintiff would show that it was the Boheler Defendants themselves that breached the contract by firing the Plaintiff from the job and by not acting in good faith by conspiring with certain third parties to prevent the Plaintiff from completing the construction of the residence, among other things, all of which is pled as a defense to that cause of action.

FOR AN EIGHTH REPLY

53. That a cause of action for fraud cannot be based upon the filing of a mechanic's lien as has been alleged and, further, as that cause of action fails to allege that the Bohelers themselves relied to their detriment upon any alleged false statement of the Plaintiff or William Terlizzi nor were special damages pled, so that cause of action should be dismissed per Rule 12(b)(6), SCRCP.

FOR A NINTH REPLY

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54. That the cause of action for unfair trade practices is not factually or legally sufficient and the same cannot be based upon allegations of either a breach of contract or the filing and foreclosure of a mechanic's lien and that a cause of action for unfair trade practices is not legally viable in the context of a mere homeowner-residence builder contractual dispute as there is no adverse impact upon the public interest and that cause of action should be dismissed pursuant to Rule 12(b)(6), SCRCP.

FOR A TENTH REPLY

55. That the Boheler Defendants were themselves negligent, grossly negligent, reckless, careless, willful and wanton in relying upon the advice and work of John Harding, by making payments directly to him outside of and contrary to their written contract with the Plaintiff, and by not seeking the advice and help of the Plaintiff or William Terlizzi at an earlier point in time, and as a consequence the recovery of the Bohelers for negligence, if any, should be reduced or barred outright as a direct and proximate result of their own negligence, carelessness and assumption of the risk.

FOR AN ELEVENTH REPLY

56. That an action for conversion cannot be asserted against a party for merely receiving money paid under the terms of a contract between the parties, both generally and specifically in the absence of any request that the money allegedly converted be returned, and that cause of action should be dismissed pursuant to Rule 12(b)(6), SCRCP.

**FOR A TWELVTH REPLY AND BY WAY OF A FIRST DEFENSE SPECIFIC
TO THE THIRD PARTY COMPLAINT**

57. That the third party complaint against William Terlizzi should be dismissed because the third party complaint does not assert any claim that William Terlizzi is liable to the Boheler Defendants in whole or in part for the Plaintiff's claims against those

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Defendants and the third party complaint is therefore not proper under Rule 14, SCRCP, and the third party complaint should be dismissed pursuant to that Rule and also Rule 12(b)(6), SCRCP.

**FOR A THIRTEENTH REPLY AND BY WAY OF A SECOND DEFENSE
SPECIFIC TO THE THIRD PARTY COMPLAINT**

58. That William Terlizzi would show that some or all claims against him are barred as those claims arise from the dealings and transactions of the Boheler Defendants with the Plaintiff, a limited liability company organized under South Carolina law with William Terlizzi as its sole member, and not from dealings and transactions with him in his individual capacity and, as such, some or all of the causes of action against him personally are barred and that he is otherwise protected from personal liability to the extent the Plaintiff's existence as a limited liability company shields him from personal liability; therefore, the third party complaint against him should be dismissed pursuant to Rule 12(b)(6), SCRCP, as to some or all of the causes of action asserted against him.

FOR A FOURTEENTH REPLY

59. That the cause of action for misrepresentation is barred because that cause of action is alleged to be based upon certain representations made prior to the execution of the written contract between the Plaintiff and the Boheler Defendants and the doctrine of merger precludes a claim based upon any alleged statements made prior to a written agreement, but not included in the written agreement.

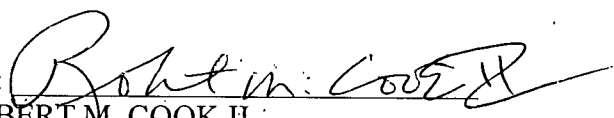
FOR A FIFTEENTH REPLY

60. That the written agreement between the Plaintiff and Boheler Defendants dated April 30, 2010, and attached hereto as Exhibit B, contains an arbitration provision in Article 5 requiring that "in the event a dispute arises regarding the satisfaction of

workmanship, materials and/or both, both parties agree to bind themselves over to arbitration by a qualified arbitrator chosen by the Better Business Bureau and will abide by the findings and resolution," and that arbitration provision is pled in defense to any and all of the causes of action asserted against the Plaintiff that fit within the parameters of the arbitration provision, to include but not necessarily be limited to the cause of action for breach of contract.

WHEREFORE, having fully replied to the answer and counter-claims of the Boheler Defendants, and having fully answered the third party complaint, the Plaintiff and William Terlizzi pray that the Court dismiss the counter-claims and third party complaint with costs against the Boheler Defendants, that the Plaintiff be granted the relief requested in its Complaint, and for such further and other relief as the Court finds appropriate and proper.

KENNEDY LAW FIRM, LLC

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ATTORNEY FOR THE PLAINTIFF AND
WILLIAM TERLIZZI AS THIRD PARTY
DEFENDANT

April 11, 2012

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Regarding your request of a written document, required by you, for the completion of our house including all items you and Keith Myers discussed pursuant to our contract. We will agree to pay you the additional monies requested in order to be able to complete the building of our house. The house however, must be completed in time for us to meet our closing date of 08/24/11 or before. Final draw/payment will be made at the closing.

Michael L. Bohle

7/22/11

75

EXHIBIT ^A ~~D~~

197

CONTRACTOR AGREEMENT

THIS AGREEMENT made the 30th day of April, 2010, by and between,

Terlizzi Home Improvement, LLC, hereinafter called the Contractor and Michael and Jeanette Boheler, hereinafter called the owner.

Witnesseth, that the Contractor and the Owner for the considerations named agree as follows:

Article 1. Scope of the Work

The Contractor shall furnish all of the materials and perform all of the work shown on the Drawings and/or described in the Specifications as annexed hereto as it pertains to work to be performed on the property located at - lot on Blackberry Lane in Newberry County, SC.

Article 2. Time of Completion

The work to be performed under this Contract shall begin approximately June 1, 2010 and shall be substantially complete by December 1, 2010.

Article 3. The Contract Price

The Owner shall pay the Contractor, for the materials and labor to be performed under the Contract, the sum of:

Two Hundred Twenty Five Thousand and no/100's...Dollars, (\$ 225,000.00).

subject to additions and deductions pursuant to authorized change orders.

Article 4. Progress Payments

Payments of the Contract Price shall be paid in the manner following:

1. \$ 22,500.00 Deposit
2. Scheduled Draws as agreed upon and amended to Contract

Article 5. General Provisions

1. All materials are guaranteed to be as specified and to carry manufacturer's warranty. All work shall be completed in a neat and workmanlike manner and in compliance with all building codes and other applicable laws. **In the event a dispute arises regarding satisfaction of workmanship, materials and/or both, both parties agree to bind themselves over to arbitration by a qualified arbitrator chosen by the Better Business Bureau and will abide by the findings and resolutions.**

2. To the extent required by law, all work shall be performed by individuals duly licensed and authorized by law to perform said work.

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NEWBERRY COUNTY
2012 APR 13 A 10:28
JACQUE & POWERS
CLERK OF COURT

- 
3. Contractor may, at its discretion, engage subcontractors to perform work hereunder, provided Contractor shall fully pay said subcontractor and in all instances remain responsible for the proper completion of this Contract.
 4. Contractor shall furnish Owner, upon request; appropriate releases or waivers of lien on all work performed or materials provided at the time the next periodic payment shall be due.
 5. Any alteration or deviation from the Specifications involving extra labor and/or material costs will become an extra charge over the agreed contract amount. All change orders shall be in writing and signed both by the Contractor and Owner. Agreements made with mechanics or subcontractors on the job are not recognized. No statement, arrangement or understanding, expressed or implied not contained herein will be recognized.
 6. It is understood that the price agreed upon herein does not include change orders or the possible expense entailed with coping with hidden or unknown contingencies found at the jobsite. In the event such contingencies arise and the Contractor is required to furnish labor and/or materials or otherwise perform work not provided for in this contract, the Contractor will give a cost of the work to the Owner and if accepted, will be paid by the Owner **before** the work is started. Contingencies include, but are not limited to: inability to reuse existing water, vent and waste pipes; the relocation of concealed pipes, risers, wiring or conduits, the presence of which cannot be determined until the work has started; or imperfections, rotting or decay in the structure or parts thereof necessitating replacement.
 7. Contractor reserves the right to use standard builder line products where particulars are not listed.
 8. Contractor warrants it is adequately insured for injury to its employees and others incurring loss or injury as a result of the acts of Contractor or employees of subcontractors.
 9. Contractor shall obtain all permits necessary for the work to be performed.
 10. Contractor agrees to remove all debris created by this Contract and leave the premises in a broom clean condition for work under this Contract.
 11. In the event Owner shall fail to pay any periodic or installment payment due hereunder, Contractor may cease work without breach pending payment or resolution of any dispute.
 12. Contractor shall not be liable for any delay due to circumstances beyond its control including strikes, rain delays, Acts of God, and any casualty, general unavailability of materials or delays caused by Owners inability to make timely decisions.
 13. Contractor warrants all work for a period of Twelve (12) months following completion.

Article 6. Other Terms

- A. The following Item(s) shall be considered as part of this Contract.

Plans dated April 2010 by David Peek
Specification Sheet attached hereto

WT

You, the Owners, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for explanation of this right.

You are authorized to do the work as specified and payment will be as outlined above. The owner upon signing this agreement represents and warrants that he/she is the owner of the premises and that he/she has read this agreement and has received a copy of the Notice of Right of Rescission.

Signed under seal this 30th day of April, 2010

Signed in the presence of:

Terlizzi Home Improvement, LLC
Contractor

By William J. Terlizzi

Michael Boheler
Owner

By X Michael L. Boheler

Jeanette Boheler
Owner

By X Jeanette A Boheler

WST

Notice of Right of Rescission

Notice to customer required by Federal law:

You have entered into a transaction on **April 30, 2010** which may result in a lien, mortgage or other security interest on your home. You have a legal right under federal law to cancel this transaction, if you desire to do so, without any penalty or obligation within three business days from the above date or any later date on which all material disclosures required under the Truth in Lending Act have been given to you. If you so cancel this transaction, any lien, mortgage or other security interest on your home arising from this transaction are automatically void. You are also entitled to receive a refund of any down payment or other consideration if you cancel. If you decide to cancel this transaction, you may do so by notifying

TERLIZZI HOME IMPROVEMENT, LLC at 259 Main Street, Leesville, SC 29070

by mail or by telegram not later than midnight of **May 5, 2010**. You may also use any other form of written notice identifying the transaction if it is delivered to the above address not later than that time. This notice may be used for that purpose by dating and signing below.

I hereby cancel this transaction.

Customer

Date

Receipt is herewith acknowledged of the foregoing NOTICE, the undersigned Customers having received copies thereof, this 30th day of April, 2010.

X _____
Customer

✓ _____
Customer

INTRODUCTION TO YOUR JOB

Thank you for your business. We appreciate the confidence that you have placed in our ability to successfully complete your building/remodeling project and we will strive to deliver a job that you will be proud of and enjoy for years to come.

We recognize that Construction can be an emotional experience as well as a financial investment. We want to make this experience a pleasant one for you, so we have compiled these pages to help guide you through the process.

WHAT TO EXPECT

A "Honeymoon" period: Right now you are looking forward to your new construction project, but there will be a lot of dust and commotion before we can reach that point. Bear with us. We will do our best to keep you comfortable.

Decisions: There will be many of them. Please be prepared to make them in a timely manner.

Delays: There will be times when you might wonder where we are. There can be *scheduled* delays waiting for materials to dry or settle. There can also be *unscheduled* delays caused by circumstances such as weather, waiting for suppliers or certain inspections that are beyond our control. We will keep you abreast of schedule issues.

Debris and Containers: Materials and debris have to go somewhere. We realize and have planned for this. We will make every attempt to keep your home as clean as possible. If you have a problem with our method, please let us know.

Mistakes Happen: Please don't judge us on the mistake; judge us on how we fix the problem.

TIPS FOR GETTING THE BEST PROJECT FOR YOUR INVESTMENT

Your job was priced on the amount of time and materials that we estimated it to take to complete the work.

Please don't carry on conversations with workers: Distracting the workers will slow the job down and drive the price up. Besides, that person probably does not have the answers to your questions.

Instead talk to your Job Contact Person. If he doesn't have the answer, he can get it for you.

Your job workers, carpenters, etc., get paid by the hour — **you're paying**, don't waste their time or your money.

RULES AND REGULATIONS

We do not want to damage your possessions. Before we arrive, you must remove all items from the immediate work area. Be aware that vibrations from hammers and banging can cause items in adjacent areas to fall from walls and tables and break.

Pets: Our workers do not bite and they expect the same from your pets. Please restrain your pets.

Toilets: We provide our own portable facilities.

Parking: Workmen carry heavy tools and toolboxes back and forth to complete your job. They need a place to park their trucks. Let us know where and where not to park.

Radios: We allow radios on the job. Our workmen have been directed in the proper use of radios on the job. Please let us know if this causes a problem.

Animals and personal visitors: Our workmen have been directed not to bring animals or have visitors on your job.

GLOSSARY OF TERMS

Acts of God: Rain, weather and other adverse conditions such as fires, that is out of the Contractor's control.

Add-ons: Additional work in areas beyond the current project that is requested by the owner and that can be considered "new projects".

Addendum: Document that describes additions, alterations, or removal, of the scope (or the terms) of a contract, mutually agreed upon by the parties to the contract.

Change Order: Any additional work that is requested by the owner during the current project that was not included in the original scope of work.

Cleaned / Cleared for work: Area is void of anything that you don't want trashed.

Close Out / End of Job: Contractor has completed the scope of work and is prepared to move to other projects.

Inspection: Official City or County inspection. Approval needed to move forward at certain stages of the project. Final Inspection is required before end of job.

Payment: Your Contract reflects a payment schedule. Payment means - due upon presentation of invoice - not at a later date. Invoices are considered past due after 3 days.

Project Schedule: A Project schedule is an outline of the order in which materials, supplies and labor will be arranged to complete your project in an efficient manner.

Punch list: Small items to complete that are agreed upon at the final walk through. Punch list designates the end of the job.

Subcontractor: A trade specialist who works for the General Contractor.

Substantial Completion: The site is ready for use; there may still be some uncompleted punch list items.

Warranty Work: Some things need to be fixed / settled / adjusted, which the Contractor will do according to contract

BUILDING SPECIFICATIONS

MICHAEL AND JEANETTE BOHELER

The OWNER is hereby advised that all dimensions hereinafter referred to are approximate. CONTRACTOR shall make every reasonable attempt to construct the subject property in strict adherence to the below specifications and plans.

The CONTRACTOR will make every reasonable attempt to construct the dwelling unit as the OWNER requests on the building lot; but further reserves the right to change and or reposition the dwelling unit as proper construction techniques and cost effectiveness dictates. For example, if the CONTRACTOR strikes rock while excavating (or for any other reason), the CONTRACTOR may reposition the dwelling unit.

I. EXCAVATION

1. All excavation required.
2. Dig basement, backfill basement when ready, and perform rough grading of all areas which have been disturbed by CONTRACTOR.
3. All topsoil shall be pushed from the work area and stacked for reuse in final grading. If additional top soil or fill is needed OR must be removed from the work site, the additional cost shall be paid by the HOMEOWNER.

If rock and/or water is encountered during excavation, the additional cost shall be paid by the HOMEOWNER. All final grading will be at the sole and exclusive discretion of the CONTRACTOR. Any grading ordered by the HOMEOWNER shall be at the sole expense of the HOMEOWNER.

4. Finish grading, raking of the disturbed areas of the lots shall be provided.

II. ROCK CLAUSE

The cost of erecting this house does not include the excavating of rock by dynamite or any other means. In the event rock is encountered in excavating the basement, sewer, water or utility lines and dynamiting or any other means is required to remove the rock; The HOMEOWNER shall defray any additional charge for removing rock by CONTRACTOR at CONTRACTORS invoiced cost.

III. DRIVEWAY

This Item is Not Included in the Contract.

IV. BASEMENT AND FOUNDATIONS

1. Basement to be 8' concrete block walls.
2. Footers shall be a minimum of 16" wide and 8" deep
3. A concrete front porch shall be provided.

WJF

V. FLOOR SYSTEM

1. 2"x10" floor joists 16" O.C. with bridging or Manufactured "I" beam system.
2. 3/4 T&G plywood or OSB sub flooring which shall be glued and nailed with bridging

VI. ROOF SYSTEM

1. A trussed roof system 24" O.C. or hand framing shall be used at the sole discretion of the CONTRACTOR.
2. 7/16 OSB roof sheeting.
3. 30 year self-sealing asphalt or fiber glass shingles over 15 pound felt.
4. Ridge vent system shall be used.
5. Front gable over hangs.
6. 6" fascia and 10"-12" soffit.

VII. INSULATION PACKAGE

1. Minimum r-13 in exterior walls
2. Minimum r-30 in ceilings of finished areas.
3. Minimum r-19 in floors

VIII. EXTERIOR FRAMING / FINISH

1. 2"x 4" - 16" O.C. wall framing w/ dbl. top and single bottom plates.
2. R-Max polystyrene sheeting on exterior walls. 7/16" OSB at corners.
3. Standard selection of HardiPlank siding.
4. Metal insulated doors
5. Exterior lights @ all exterior doors.

IX. INTERIOR FINISH

1. All interior wall framing 16" O.C. w/ 1/2" drywall on walls and ceilings, smooth finish, painted.
2. Bamboo flooring from builder standard grades provided for foyer, kitchen, dinette, great room, dining room, bedrooms, pantry, storage area and all second floor living area. Ceramic floor tile provided for bath rooms.

W9

3. Raised six-panel molded doors w/semi-gloss paint
4. Standard trim w/semi-gloss paint
5. Wire-vented shelving.
6. Standard paint / trim package. Dark colors will be an extra charge.

X. PLUMBING

1. A 40 gal. electric water heater - location determined by builder.
2. A single anti-frost hose bib shall be provided on the front and rear of the house. The location shall be determined by the builder.
3. Tie in to existing water main and septic/sewer systems. Contractor does not warrant existing systems or the ability to use same.
4. Waste and vent lines shall be PVC.
5. Water supply lines shall be CPVC, PVC or poly-tex.
6. Plumbing shall be provided for a washing machine.
7. Shut-off valves on all water lines and faucets shall be provided.
8. Water line for ice-maker provided.
9. All additional basement plumbing extra.
10. Standard builders grade faucets

XI. ELECTRIC

1. A central heat and air shall be provided w/ a centrally located thermostat placed by HVAC installer.
2. A 200 amp service panel shall be provided.
3. Basement shall have a porcelain light fixture and one receptacle.
4. A door bell shall be provided @ front entrance.
5. Exhaust fans provided in all bathrooms.
6. Recessed lights per plans.
7. Service to the house and a completely functional electric system shall be provided.

8. All wet areas and outside receptacles to have GFI protected circuit.

XII. CARPETING AND OTHER FLOORING

1. N/A

XIII. WINDOWS

1. Vinyl casement windows

XIV. KITCHEN

1. A double bowl stainless steel sink shall be provided.
2. Manufactured kitchen cabinets.
3. FORMICA or equal counter top provided w/ 4" back splash.

XV. BATHROOMS

1. A bathroom vanity shall be provided, with cultured marble top with integrated sink and single lever faucet shall be provided.
2. The commode shall be comfort height and shall be white
3. A white soaking safety tub shall be provided in master bathroom
4. A power vent shall be provided.
5. A wall mounted mirror above the vanity w/ a standard light fixture shall be provided.

XVI. BASEMENT LEVEL

1. The basement shall remain unfinished.

XVII. HOME CUSTOMIZATION PROVISIONS

1. The above specifications are for the submitted building costs. Any additions, deletions, revisions, and or modifications represent the customization of the above building costs. Any following provisions shall supersede any of the above specifications where they conflict.
2. Any up-grades / additions made by the homeowner after contract is signed shall be paid to builder prior to commencement of that up-grade /addition.

XIX. WAIVERS

1. The builder reserves the right to replace any of the above materials with that of equal or greater quality.

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS

C.A. NO.: 2012-CP-36-00090

Terlizzi Home Improvement, LLC,)
PLAINTIFF,)

vs.)

Michael L. Boheler and Jeanette)
A. Boheler,)
DEFENDANTS,)

vs.)

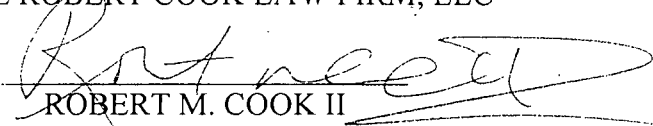
William Terlizzi,)
THIRD-PARTY DEFENDANT.)

PLAINTIFF'S STIPULATION OF REDUCED
LIEN AMOUNT

TO: THE HONORABLE JACKIE S. BOWERS, CLERK OF COURT FOR NEWBERRY
COUNTY; AND CHARLES A. KRAWCZYK, ESQ., ATTORNEY FOR THE
DEFENDANTS.

YOU WILL PLEASE TAKE NOTICE THAT the Plaintiff, Terlizzi Home Improvement,
LLC, by and through its undersigned counsel, stipulates that the amount it is seeking under the
previously filed mechanic's lien in this matter is reduced to \$48,864.23.

THE ROBERT COOK LAW FIRM, LLC

By: 

ROBERT M. COOK II

128 N. Oak Street, Batesburg, SC 29006

P.O. Box 3575, Leesville, SC 29070

803-317-2171 (phone)

803-317-2175 (fax)

robcook1965@yahoo.com

ATTORNEY FOR THE PLAINTIFF

September 23rd, 2013

JACKIE S. BOWERS
CLERK OF COURT

FILED
NEWBERRY COUNTY
2013 SEP 24 PM 12:10
86

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF NEWBERRY	)	CIVIL ACTION NO. 2012-CP-36-00090
Terlizzi Home Improvement, LLC,	)	
Plaintiff,	)	
vs.	)	NOTICE OF MOTION AND MOTION FOR
Michael L. Boheler, Jeannette A. Boheler,	)	PARTIAL SUMMARY JUDGMENT
and The Palmetto Bank as Assignee of	)	
Midlands Mortgage Corp.,	)	
vs.	)	
William Terlizzi	)	
Defendants.	)	
	)	

**I. TO: PLAINTIFF TERLIZZI HOME IMPROVEMENT, LLC, AND ITS
ATTORNEY ROBERT M. COOK II, ESQUIRE:**

YOU WILL PLEASE TAKE NOTICE that Defendants/Third Party Plaintiffs, Michael and Jeannette Boheler (hereinafter "the Bohelers"), by and through their undersigned attorneys, will move before the Presiding Judge of Newberry County Court of Common Pleas ten (10) days after service hereof or at a date and time set by the court for an order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure finding that there is no genuine issue of material fact and granting the Bohelers judgment as a matter of law as to the following:

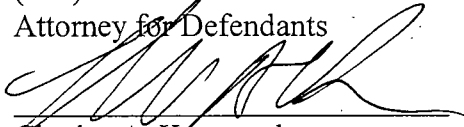
1. Plaintiff's action for foreclosure of the mechanic's lien filed against the Bohelers.

This motion is based upon the pleadings, discovery completed to date, the statutory and decision law of the State of South Carolina, and the South Carolina Rules of Civil Procedure.

Plaintiff reserves the right to submit a memorandum of law and fact with exhibits in support of this motion.

Respectfully submitted,

FINKEL LAW FIRM, L.L.C.
1201 Main Street, Suite 1800
Post Office Box 1799
Columbia, South Carolina 29202
(803) 765-2935
Attorney for Defendants

A handwritten signature in black ink, appearing to read 'Charles A. Krawczyk', written over a horizontal line.

Charles A. Krawczyk
SC Bar Number: 16832

Columbia, South Carolina
January 9, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS

C.A. NO.: 2012-CP-36-00090

Terlizzi Home Improvement, LLC,)
PLAINTIFF,)

vs.)

Michael L. Boheler and Jeanette)
A. Boheler,)
DEFENDANTS,)

vs.)

William Terlizzi,)
THIRD-PARTY DEFENDANT.)

NOTICE OF MOTION AND MOTION TO
RECONSIDER

FILED
NEWBERRY COUNTY
2014 JUL 11 PM 12 43
JACKIE S. BOWERS
CLERK OF COURT

TO: THE HONORABLE FRANK R. ADDY, JR., CIRCUIT COURT JUDGE; AND
CHARLES A. KRAWCZYK, ESQ., ATTORNEY FOR THE DEFENDANTS.

YOU WILL PLEASE TAKE NOTICE THAT the Plaintiff (Terlizzi Home Improvement, LLC) and the Third-Party Defendant (William Terlizzi) will move pursuant to Rule 59(e), SCRCP, and such other law as may be applicable, ten (10) days after service hereof at the Newberry County Courthouse, or at such other time and place as the Court may direct, for the Court to reconsider and reverse, or otherwise amend its order dated July 1, 2014, for the reasons stated below:

A. AS TO THAT PART OF THE ORDER GRANTING SUMMARY JUDGMENT.

1. That the Court erred in granting summary judgment to the Defendants and dismissing the mechanic's lien when the Court's prior order filed November 22, 2011, refused to dismiss the original mechanic's lien because Plaintiff made out a prima facie case for its lien, and also the Court's prior order filed July 2, 2013, found there were genuine issues of material fact in dispute regarding the circumstances and events that ultimately gave rise to the Plaintiff's mechanic's lien.
2. That the Court erred in granting summary judgment to the Defendants and dismissing the mechanic's lien when there were genuine issues of material fact in dispute as to

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1

R. R. R.

the terms of the contractual agreement between the parties, the scope of the authority of John Harding, the increase in costs due to changed plans, the increase in costs due to extras and changes requested by the Defendants, the payments made by the Defendants to John Harding rather than to the Plaintiff, whether or not the Plaintiff was fired from the job by the Defendants; and the Plaintiff's purpose in filing the mechanic's lien; all of which disputes are relevant to a determination of whether or not the original mechanic's lien was filed in good faith.

3. That the Court erred in granting summary judgment to the Defendants and dismissing the mechanic's lien when it was undisputed that the Plaintiff voluntarily reduced the amount of its mechanic's lien to \$48,864.23 by stipulation filed September 24, 2013, and the Defendants accepted the benefit of that reduction by receiving back from the Court a portion of their posted cash bond, all of which was done prior to the Defendants filing a motion for summary judgment that was based solely upon the amount of the originally filed mechanic's lien. The Plaintiff specifically requests that the Court directly rule on the amount of the mechanic's lien asserted by the Plaintiff at the time the Defendants filed their summary judgment motion and whether or not the Defendants waived their right (or are otherwise barred) to seek a dismissal of the lien based upon the original amount of the lien by waiting months after the lien was reduced before filing the motion.
4. That the Court erred in granting summary judgment to the Defendants and dismissing the mechanic's lien when the testimony of the Plaintiff's principal (William Terlizzi) provided at least some evidence of a rational and/or good faith basis for calculating the original amount of the lien and that the Court's findings of willful and wanton conduct are not appropriate in the absence of full testimonial/evidentiary trial on the merits.
5. That the Court erred in granting summary judgment to the Defendants and dismissing the mechanic's lien when there was a genuine material dispute as to the enforceability of the mechanic's lien waivers relied upon by the Court in support of its ruling. See Taylor, Cotton & Ridley v. Okatie Hotel Group, LLC, 372 S.C. 89, 641 S.E.2d 459 (Ct. App. 2007).

6. That the Court erred in granting summary judgment to the Defendants and dismissing the mechanic's lien in that the Court incorrectly equated the subsequent voluntary reduction in the lien amount as proof that there was no evidence that the original lien amount was filed in good faith.

B. AS TO THE AWARD OF ATTORNEY'S FEES/COSTS.

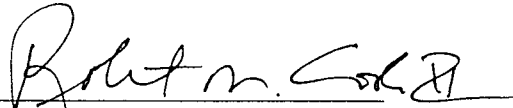
1. That the Court erred in awarding attorney's fee and costs in the amount of \$31,611.75 in a case involving only two depositions, two hearings related to the mechanic's lien each of which probably lasted between an hour and two hours, and no trial on the merits. The amount of fees and costs should be substantially reduced to reflect the limited amount of time actually necessary to the litigation related to the mechanic's lien.
2. That the Court erred in awarding an amount of fees based upon a non-specific affidavit from the Defendants' attorney that baldly states only that 75.6% of his total fees are related to the mechanic's lien action without providing adequate evidentiary support for that assertion in that there are no findings as to what specific attorney charges were and were not related to the mechanic's lien action.
3. That the Court erred in awarding fees based, in part, upon time spent by law clerks that was billed at \$125/hour, which hourly amount is manifestly unreasonable and further that law clerk time should not be assessed in awarding fees.
4. That the Court erred in failing to strictly construe the fee-shifting provision in the mechanic's lien law so as to award fees and costs only against the party actually bringing the mechanic's lien foreclosure action, which was the Plaintiff company, and not William Terlizzi individually; further, there is no statutory or case law precedent for awarding attorney's fees in a mechanic's action against a non-party, or to hold the owner of a limited liability company liable for fees resulting from an action brought by the company alone.
5. That the Court erred in failing to find that the Plaintiff's status as a limited liability company precluded a finding of individual liability of William Terlizzi. See 16 Jade

Street, LLC v. R. Design Constr. Co., et al, 747 S.E.2d 770 (S.C. 2013); further, as the individual liability of an owner of a limited liability company in such a context is a novel question of law, it was inappropriate to make such a determination in the context of a summary judgment motion.

6. That the Court erred in holding William Terlizzi individually liable for attorney's fees and costs when neither the pleadings nor motions filed by the Defendants requested such relief or raised such issue.

This motion will be supported by the pleadings and files in this matter along with such argument and other evidence the Court may allow. Counsel for the Plaintiff and Third Party Defendant affirms that consultation with opposing counsel about the substance of this motion would serve no useful purpose given the nature of the motion.

THE ROBERT COOK LAW FIRM, LCC

By: 

ROBERT M. COOK II
128 N. Oak Street, Batesburg, SC 29006
P.O. Box 3575, Leesville, SC 29070
803-317-2171 (phone)
803-317-2175 (fax)
robcook1965@yahoo.com

ATTORNEY FOR THE PLAINTIFF AND THIRD
PARTY DEFENDANT

July 10, 2014

STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS

TERLIZZI HOME IMPROVEMENT)
LLC,)

2012-CP-36-00090

PLAINTIFF,)

-VS-)

MICHAEL L. BOHELER, ET AL,)

DEFENDANTS.)

TRANSCRIPT OF RECORD

MARCH 12, 2014
NEWBERRY, SOUTH CAROLINA

B E F O R E:

THE HONORABLE FRANK R. ADDY, Jr., JUDGE

A P P E A R A N C E S:

ATTORNEY FOR PLAINTIFF:

ROBERT M. COOK, II, ESQUIRE

ATTORNEY FOR DEFENDANT:

CHARLES A. KRAWCZYK, ESQUIRE

TARA T. SCOTT, CVR
CIRCUIT COURT REPORTER

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EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>
(There were no exhibits presented during this hearing.)			

02/12/14

1 THE COURT: We're on the record on 12-CP-36-90,
2 Terlizzi or --

3 MR. COOK: Terlizzi, Your Honor.

4 THE COURT: Terlizzi?

5 MR. COOK: Yes, sir.

6 THE COURT: All right. Terlizzi Home Improvements v
7 Boheler; is that right?

8 MR. KRAWCZYK: Boheler.

9 THE COURT: Boheler?

10 MR. KRAWCZYK: Yes.

11 THE COURT: We may just end up going with Plaintiff and
12 Defendant, gentlemen. The -- I believe that this is a
13 motion for partial summary judgement on construction of a
14 house, correct?

15 MR. KRAWCZYK: That's correct, Your Honor.

16 THE COURT: I did have a chance to review the email and
17 attachments that you sent to me on March the 10th, so I'm
18 aware of what this case is about. I have -- I don't recall
19 receiving anything from Plaintiff on -- did we get it?

20 MR. COOK: It was emailed yesterday, Your Honor. And I
21 have a copy to hand up to you if you don't have it handy,
22 also.

23 THE COURT: Did you send it to me or my clerk?

24 MR. COOK: I believe your clerk, Your Honor.

1 THE COURT: Okay. If you have a hard copy I can look
2 at that while the hearing is going on.

3 MR. COOK: Counsel has already been provided of that --

4 THE COURT: Sure.

5 MR. COOK: -- by the same means, Your Honor. I believe
6 Mr. Krawczyk, on behalf of the Defendant, sent his on Monday
7 and mine was sent yesterday.

8 THE COURT: Okay. Very good. I'm happy to hear the
9 Defendant's motion at this point.

10 MR. KRAWCZYK: Thank you, Your Honor. For the court
11 reporter's information, I'm Charles Krawczyk. I'm here on
12 behalf of Mr. and Mrs. Boheler. Mr. Boheler is here behind
13 me.

14 As Your Honor is aware, this is a case in which we have
15 -- my clients have been sued on four causes of action;
16 foreclosure of mechanic's lien, breach of contract, a
17 quantum meruit, and I forget. There's one other. But
18 that's the gist of the complaint.

19 I want the court to be clear that the only thing that
20 we are addressing here today --

21 THE COURT: The mechanic's lien.

22 MR. KRAWCZYK: -- is the mechanic's lien issue. Again,
23 I submitted a very large brief, Your Honor. Unusual for me
24 in a mechanic's lien case. But quite honestly, I struggle
25 with this case because there are so many ways in which this

1 lien was improper and so many things that were wrong with
2 the process that I struggle as to which facts and which
3 issues to bring to your attention. In my 20 years of
4 practicing construction law it's the most -- to me, the most
5 egregious abuse of a mechanic's lien that I've been involved
6 in.

7 Again, the mechanic's lien is a creature of statute.
8 It's a derogation of the common law, and as such, the intent
9 of that statute must be strictly adhered to, and certain
10 things must be done in order for that lien to be a valid
11 lien. For example, you have to file it within 90 days. If
12 you don't do it within -- if you do it on the 91st you're
13 out. All those things apply.

14 I want to give you a little background -- brief
15 background, Your Honor, that this case -- and I'm going to
16 do it in terms of the fact -- since this is a summary
17 judgement motion, of facts that are undisputed. They are
18 facts that have either been admitted by Mr. Terlizzi, who is
19 the agent for the Plaintiff, or are undisputed. The first
20 being that THI, who is the Plaintiff, and the Boheler's
21 entered into a contract on April 30 for construction of a
22 home. It was a fixed price for \$225,000.00. There's no
23 controversy, no question that there was a gentleman named
24 John Harding who at that time -- well, let me back up. Who
25 at that time had an arrangement with THI. And the

1 arrangement, as testified to by Mr. Terlizzi, is they would
2 construct the house. Mr. Harding would be in charge of the
3 actual construction. Mr. Terlizzi would be responsible for
4 the money, and they would split the profits 50/50. That's
5 exact -- that's what their testimony is. So there's no
6 question that that's the black letter law of a partnership.
7 That's what that is. There's no question that Mr. Harding
8 was the only contact that the Boheler's had with the
9 company. Mr. Harding negotiated the contract. He helped
10 them with the plans. He helped them with the
11 specifications. He went through all the issues. He did all
12 the work associated with this up to a certain point when
13 problems happened. This was the exact role that Mr.
14 Terlizzi anticipated would happen. Mr. Harding would be the
15 man on the job, and then Mr. Harding had the authority to do
16 everything necessary to interpret the Plaintiff's
17 obligations under the contract.

18 Now, there is no dispute and controversy that the final
19 plans -- in September of 2010, after the original contract,
20 the final plans for construction of the Boheler house were
21 completed, and that Mr. Harding gave those plans both to the
22 Bohelers and to Mr. Terlizzi, and that Mr. Terlizzi knew and
23 understood that Mr. Harding was going to build the house
24 pursuant to the second set of plans for \$225,000. There's
25 no -- there's no -- that's exactly what Mr. Terlizzi has

1 testified to.

2 There's no -- at some point in time -- well, let me
3 back up. There's no dispute that up until March of 2011,
4 upon payment, every payment, that THI signed a lien waiver
5 for its payments and for the work completed up to that point
6 on behalf of -- in favor of the bank and of the Bohelers.
7 There's no -- there's no question or controversy in that.
8 There's no question that those lien waivers were paid for
9 consideration and that they were valid.

10 At some point in time, and -- at some point in time
11 some problems arose with this particular house. And at that
12 point in time the Bohelers contacted THI to say, hey, your
13 man on the job, Mr. Harding, is messing up. You need to
14 come back and you need to take charge of this, which Mr.
15 Terlizzi did. And he came in. Of course, he had not been
16 involved in the construction at all. He had let Mr. Harding
17 handle all of that. And it turns out that Mr. Harding had
18 agreed to build a house in accordance with the September
19 2010 plans, which Mr. Terlizzi knew about, and had promised
20 the Bohelers a number of different things, and said that he
21 could do it all within the \$225,000 amount. Again, that's
22 not in dispute. That when Mr. Terlizzi came onto the job
23 that was what he understood. Of course, there was some
24 problems at the end of the job and Mr. Terlizzi ended up not
25 being the contractor anymore. And the reason why that

1 happens doesn't matter today, because today all we're
2 talking about is the lien. We're not talking about what the
3 contractual arrangement was between the parties or what --
4 you know, who owes what for the contract, and what were
5 extras and what were changes. We're talking about a lien.

6 And the reason I give you that background, Your Honor,
7 is because after construction was completed -- and Mr.
8 Terlizzi alleges that he was fired, and even assuming he's
9 correct. After he was fired he approached his man on the
10 job, Mr. Harding. And he told -- and Mr. Harding has filed
11 a sworn affidavit in this action. And I would allege that
12 Mr. Harding is a partner by very definition and by admission
13 of Mr. Boheler - I mean, excuse me, of Mr. Terlizzi. Mr.
14 Terlizzi may say that he's not a partner, but when you enter
15 into an agreement, a business arrangement, and you agree to
16 share profits and you each split up the work to be done,
17 it's a partnership. He approached his partner and said, I
18 think the Bohelers are going to sue us. I plan to put a
19 lien on this house so large that we'll have the Bohelers
20 over a barrel and they won't be able to bond this off. They
21 don't have the money to bond this off or to lawyer up, and
22 the worst thing that happens is this house goes into
23 foreclosure and we split the profits. And if you look at
24 Mr. Harding's affidavit he's clear. That's what he did.
25 And then he -- and in his affidavit he said, I refuse to be

1 part of that. And that I told Mr. Terlizzi that all the
2 things he was claiming as extras I had agreed to do. They
3 were in the September 2010 plans. In his deposition Mr.
4 Terlizzi admits he knew Mr. Harding planned to build this
5 house, and that the new agreement was to build this second
6 set of plans which had all these changes and extras, and
7 that he wouldn't go -- and Mr. Harding said, I'm not going
8 to go along with that.

9 So the other thing that's not in dispute is that the
10 Bohelers have paid a sum total of \$221,000 to THI and to Mr.
11 Harding. Some checks were made out to Mr. Harding, some
12 were made up to THI. But they've paid \$221,000 for this
13 house. Mr. Terlizzi files a lien for \$106,000.

14 Now, what's the intent of a lien, Your Honor. The
15 intent of a mechanic's lien is not to allow a contractor to
16 put a lien on a house to collect his contractual rights.
17 It's to put a lien on the house for the material labor
18 actually used up to that point. So if I have a contract
19 with Mr. Boheler to paint his house, and I pay my employee
20 \$100 to do the work and I buy \$50 worth of paint, but my
21 contract says it's \$1,000 to paint your house, I cannot lien
22 \$1,000 on the house. I can only lien \$150. And there's
23 case law right on point. You can't put overhead and profit.
24 Those things are not lienable. So what is a contractor
25 required to do under the statute. They're required to go

1 and do an accounting of how much actual material and labor
2 they have on the job. They have to look at receipts. They
3 have to look at checks. They have to have an actual basis
4 for what their claiming as a lien.

5 Now, when the Bohelers were served with this lien they
6 contacted me. At that point in time I looked at it, and on
7 its face, to me, the lien is improper. Number one, it's
8 seeking the contract amount. Again, that's not something
9 you're allowed to claim in the lien. You're only allowed to
10 get the material and labor. And then it's claiming two
11 contract causes of action for extras in plans. And we'll
12 get to that. But more importantly, the \$106,000 could no
13 way reflect, after being paid -- even to go by his numbers,
14 \$190,000, there's no way that there could be \$106,000 in
15 outstanding material and labor on this job.

16 Now, I contacted Plaintiff through counsel, through
17 emails, and I told them that exact same thing. Those emails
18 are attached. And I said, Your Honor, I said, you cannot --
19 you can only lien actual material and labor. I'm not asking
20 you to remove the lien. I'm asking you to do an accounting
21 and reduce it to what he actually has in the job so we can
22 then bond it off and litigate. That's what we requested in
23 September of 2011, and the response was, no, we're not going
24 to do that. And as you see in my email, I said -- I said,
25 so be it, Your Honor -- so be it if that's what he wants to

1 claim. I think he's claiming more than he's due.

2 So let's fast forward. They file their -- they file
3 their lawsuit to foreclose. We force them in discovery to
4 do an accounting. And in the accounting, even including
5 late charges to his bank, which aren't associated with this,
6 and sodas and food at a gas station, anything he could throw
7 in, the most he could come up with was about \$48,000 in
8 additional money above what he's been paid. Well, Your
9 Honor, that's almost precisely the amount that I asked them
10 to reduce the lien to in 2011. That's exactly what I asked
11 them to do. And so, two and a half years later into a
12 deposition Mr. Terlizzi admits that he guessed at the
13 amount. He didn't have actual invoices. He didn't go by --
14 he reversed engineered. He looked at this and said, well,
15 the original plans were for this house, and the second set
16 of plans were for this house, so I'm going to go back and
17 guess at what it would cost to do those changes. And then
18 he added 55 percent, or 35 percent profit on top of it, came
19 up with the number. That was a complete guess, and a
20 complete estimate. And it shows. When he did his actual
21 accounting it was \$48,000. So what effect did this have on
22 the Bohelers?

23 Now, under the -- they have a choice. They can either
24 bond off this lien, which requires the amount of the lien,
25 plus a third, or they can lose this house to foreclosure.

1 Because as soon as Mr. -- as soon as Mr. Terlizzi filed this
2 lien the bank came and stopped all funds. So they were
3 either going to lose this house -- exactly what Mr. Terlizzi
4 told Mr. Harding was going to happen, happened. The bank
5 cut him off. The Bohelers were forced, at this point in
6 time, to empty their 401K accounts. Now, and let me back up
7 just a little bit. Mr. Boheler and his wife are retired.
8 This is their home. This is their dream home. This is it.
9 Mrs. Boheler is handicapped, and so, they needed a
10 handicapped house. This is a -- building this house was a
11 stretch for them to begin with. Now they have to come up
12 with -- after paying \$190,000, they have to come up with
13 another \$143,000 to bond off the loan. So they empty their
14 401K. They have to take out a loan. Nobody will give them
15 a bond, because they don't have the assets to secure a bond.
16 And they scrape together \$143,000 to bond off this lien so
17 they can save their house.

18 Also as part of that, because now they have no cash,
19 the Bohelers have to go -- Mr. Boheler has to go on Social
20 Security early, which -- because otherwise they'll have no
21 money. So that's where the Bohelers sit at the beginning of
22 this case. Two and a half years later it's discovered in
23 discovery that the lien wasn't correct. That they didn't
24 use actual labor and material used on the job to come up --
25 they came up with this guess. And what was their response

1 two and a half years later? Their intent is to file a new
2 lien. So this year Mr. -- the Plaintiff files a stipulation
3 of reduction of lien. Well, Your Honor, it's too late for
4 that. That's not -- there's no statutory authority. Again,
5 we're talking a statute that must be strictly complied with.
6 There's no statutory authority to amend a lien. It's not
7 like a pleading where there's a statute that says that you
8 can have so many days you can ask permission of the court.
9 No. You have 90 days to file your actual lien. You have to
10 have that accurate 100 percent, and if you don't, you're
11 out.

12 What they've essentially done now is admit that the
13 initial lien was improper. They filed this new lien which
14 is on a totally different basis. And now is why I want to
15 get back to the original lien for just a minute, Your Honor.

16 The original lien, if Your Honor looks at it, is
17 specifically for three things. It's for the contract
18 amount, it's for changes, and it's for extras. It doesn't
19 say for material -- it's for material and labors for those
20 specific things. Well, it turns out again in discovery, we
21 find out, that all -- that Mr. Terlizzi has filed a lien
22 waiver specifically for all those items. That's in his
23 deposition. I asked him. I asked Mr. Terlizzi, you
24 understand, you signed a lien waiver, and we would go extra
25 by extra. For example, the extended basement. You would

1 agree at the time you signed this lien waiver that you --
2 that the basement was already completed. Yes. And in his
3 deposition I asked Mr. Terlizzi, do you have any -- do you --
4 - I asked him specifically was there any reason why the
5 liens weren't valid, and he said no, sir. So he knew he
6 didn't sign lien waivers for these things. He knew he
7 didn't use material and labor associated -- or the actual
8 material and labor that he guessed. And to top it all off,
9 Your Honor, again, I go back to the fact that we have
10 unrefuted testimony from Mr. Harding that said that this is
11 what his plan was. That he was coming to -- he was coming
12 to this county seat to file a lien big enough to keep the
13 Bohelers over a barrel, and it did. It nearly has put the
14 Bohelers to financial ruin.

15 So where do we stand now, Your Honor. We're not here
16 to dispute that there's a contractual disagreement between
17 us and THI. There's no dispute as to those facts. In fact,
18 Mr. Cook has filed a memorandum and he talks about all these
19 questions of fact, and they all go to the contract. None of
20 them go to the lien. They all go to the question of
21 contract. And we're not here to argue that. All we're here
22 to argue is that the purpose -- that number one -- that I
23 put this in there, number one, the lien wasn't proper
24 because it wasn't for material and labor actually used in
25 the construction of the house. It was a guess. It was a

1 reverse engineering that included overhead and profit. All
2 of these things which are not lienable.

3 Number two, Mr. Terlizzi intentionally overstated his
4 lien. And pursuant to 29-5100, Your Honor has the authority
5 to dismiss this lien if it can be shown that he
6 intentionally and knowingly and willfully filed a lien for
7 more than he was entitled to. Also, the fact that this -- I
8 think where we stand now is there is a new lien that's not
9 timely filed. And that amended lien cannot bootstrap the
10 old lien. Because if that were the case then a contractor -
11 - all they'd have to do is, oh, I'm going to take my best
12 estimate of what I'm owed on this case, and two years later,
13 if it turns out I'm wrong, I'm going to amend my lien. And
14 we're not talking the difference between 100 and \$103,000.
15 We're talking between \$106,000 and \$48,000. Okay?

16 So in looking at this, Your Honor, I don't think
17 there's any question. If this doesn't amount to an improper
18 lien, then, quite frankly, I don't know what ever would.
19 And there is -- there is authority for Your Honor dismissing
20 a lien and then allowing the Plaintiff to proceed in his
21 contract causes of action. And we're more than willing to
22 do that. But as of today, Your Honor, this particular cause
23 of action needs to go.

24 THE COURT: All right.

25 MR. KRAWCZYK: And I'd be willing, of course, to answer

1 any questions or point to testimony anywhere you wish, Your
2 Honor. I've got some -- later on, I've got Mr. Terlizzi's
3 deposition annotated with some yellow marker and stuff if
4 Your Honor needs it.

5 THE COURT: I probably will -- I may need to. All
6 right. What do you all take issue with, as far as what he's
7 presented? I've read just -- I looked through your
8 memorandum and opposition of summary judgement, and --

9 MR. KRAWCZYK: Yes, sir. And can I --

10 THE COURT: -- it does seem to allude more to the
11 contract causes of actions and the quantum meruit causes of
12 action than it does the actual mechanic's lien itself. And
13 I did have a chance to flip back through the file and look
14 at the prior orders involving the summary judgement motions
15 made with respect to your client's motions against their
16 counter-claims and what those judges found.

17 Here's what I'm having -- and let's just cut straight
18 to the chase. Here's what I'm having an issue with. As he
19 put it a moment ago, there's a difference between 103,000
20 and 104,000. There's an amazing difference between the lien
21 that was filed in this case, that they had to bond off of,
22 and what a few months ago the Plaintiff reduced his lien --
23 his actual lien to. I understand a mechanic's lien is an
24 action at law, but certainly, correct me if I'm wrong, but
25 equitable principals do apply to a mechanic's lien. Am I

1 mistaken?

2 MR. KRAWCZYK: Your Honor, in our brief we cite a case
3 that says --

4 THE COURT: I know that you're entitled to a jury trial
5 on a mechanic's lien, and I know that that's technically an
6 action at law, but because it's by way of a foreclosure it
7 seemed to also involve -- or --

8 MR. KRAWCZYK: May I approach?

9 THE COURT: Please.

10 MR. KRAWCZYK: Okay. This is the case of *Sea Pines vs*
11 *Kiawah Island*, Your Honor. That is cited in my brief. That
12 case shows all the different ways in which a mechanic's lien
13 may be dismissed. The part I want to bring your attention
14 to at the end is where the court -- this is what the South
15 Carolina Supreme Court said. "We refuse to hold that such a
16 lien may not be discharged in any non-statutory fashion.
17 After one ceases to supply material and labor he has six
18 months to commence an action for collection of the debt and
19 foreclosure of the lien. An unscrupulous claimant might
20 file spurious lien and curtail the landowner's full
21 enjoyment of his property unless the court has the authority
22 to grant relief. We can envision situations in which
23 irreparable damages can be inflicted upon the land owner
24 unless the door to the court be opened again. A bond can be
25 required of the landowner to secure the claimant, but no

1 bond can be required of the claimant to secure the landowner
2 against damages." Basically what the court said in there is
3 that you have the -- it cites this exact things, is that
4 this court has the inherent power to afford relief or the
5 depravation imposed by a wrongfully filed mechanic's lien
6 cannot be corrected by statutory methods.

7 THE COURT: Which would seem to implicate equity.

8 MR. KRAWCZYK: Yes, Your Honor, that's exactly -- and
9 it's saying, well, you don't have to follow the statute,
10 Your Honor. If you look at this and you say that this -- in
11 equity this is not fair or right, you can dismiss this lien.
12 And that's exactly what we've got going on in this
13 particular case.

14 THE COURT: I'd feel better if they actually used the
15 word equity in there somewhere. But --

16 MR. KRAWCZYK: The inherent powers of the court, Your
17 Honor, is --

18 MR. COOK: Your Honor, I have several responses to all
19 that.

20 THE COURT: Sure. Please, go ahead.

21 MR. COOK: First of all which is this very issue has
22 been heard by the court before and decided against Mr.
23 Boheler. After the filing of the lien, a motion to dismiss
24 on this very basis, saying that the lien was willful and
25 knowingly in an incorrect amount was heard by this court.

1 Not you. By another -- I forget which judge it was
2 actually. And they denied that motion. And that's what's
3 referenced in my brief is that this has already been
4 determined one time. In that last part of my brief I
5 mentioned two hearings. One is our summary judgement
6 hearing on the counter-claim, but the first thing I
7 mentioned was the motion to dismiss hearing in which this
8 very issue was brought up and decided against the Bohelers.

9 THE COURT: Did that predate the reduction -- or your
10 client's voluntary reduction?

11 MR. COOK: Oh, it did. Yes, sir. No question about
12 it. Yes, sir.

13 THE COURT: Okay. And I imagine that the court at that
14 particular point in time probably took the position of,
15 well, we really don't know what's owed. I'm going to let
16 you all do discovery and we'll take a look at it.

17 MR. KRAWCZYK: In fact, that was Mr. Cook's argument.

18 THE COURT: Let me -- I haven't looked at the order,
19 but keep going.

20 MR. COOK: Well, Your Honor, I mean, the fact of the
21 matter is, and the cases that I cited in my brief say, look,
22 when there's a factual dispute you don't dismiss these
23 mechanic's liens. I take exception to what Mr. Krawczyk has
24 said about what can and cannot be included in a lien. There
25 is no question that upon review of documentation and suck my

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1 client has reduced the amount that he is seeking. This is
2 the first time in 20 years of practicing law I've ever had
3 an opponent complain about someone reducing the amount that
4 they were seeking to have them pay. Mr. Krawczyk would have
5 you believe that things like overhead and profit cannot be
6 included as part of a mechanic's lien. Your Honor, I would
7 cite to you the cases of *Sentry Engineering vs. Mariner's*
8 *Cay*, which is a Supreme Court 1985 case, at 287 346. The
9 case says, "We hold that overhead and profit --" it
10 specifically addresses it. It says, "When stated as part of
11 the contract price are proper components of a mechanic's
12 lien." Also the case of -- let's see. Hold on a second,
13 Your Honor. I'm sorry. *Yepsa, Y-e-p-s-a, Construction*,
14 which is a 2003 court of appeals case, found at 356 39. It
15 states, "Generally overhead cost and lost profits are not
16 within the purview of mechanic's lien statute, but when
17 overhead cost and profits are provided for in the contract
18 they become subject to collection on a mechanic's lien."

19 Now, the reason why that's relevant, Your Honor, when
20 you look at the affidavit that Mr. Terlizzi submitted in
21 opposition to that motion back at the very beginning -- I
22 assume that's in the court's file, but I don't know that for
23 certain. I can give you a copy of it, Your Honor.

24 MR. KRAWCZYK: Your Honor, if I may about that. That
25 was a pre-suit motion in accordance with -- it basically was

1 the sort of -- it was not part of this case. It's not law
2 of this case. But I'll address it however Your Honor would
3 like.

4 THE COURT: Okay. Well, is it in this file that I'm
5 flipping through right now?

6 MR. KRAWCZYK: No, Your Honor, it's not in this file.

7 THE COURT: Then I'm not going to bother flipping
8 through it.

9 MR. COOK: Your Honor --

10 THE COURT: Yes, sir.

11 MR. COOK: -- this is a copy of the affidavit that was
12 submitted. And you can see that what Mr. -- in that
13 affidavit it shows you towards the bottom how that figure
14 came up, which was the total contract price, plus the cost
15 of the extras and change orders, less payments. Okay? Now,
16 and there's no question that in his deposition and in
17 discovery that Mr. Terlizzi has indicated that the figures
18 for the extras and changes, that he was factoring in
19 overhead and profit. That affidavit also states that at the
20 time he was fired the house was also substantially complete.
21 Now, as part of the discovery process, Mr. Terlizzi and I
22 have spoken and agreed that probably from a trial standpoint
23 the most advantageous thing for us to do is to present the
24 case as what his net loss was as opposed to what was claimed
25 in that particular affidavit. But it is not inevitable that

1 you make the conclusion that because 106 was claimed at one
2 point and now 48,000 is being claimed at another point, that
3 there wasn't justification for the original figure. What
4 I'm showing you is the justification for that original
5 figure, Your Honor.

6 THE COURT: In their memorandum that they submitted
7 earlier this week they said that waivers were obtained
8 throughout this construction, and I took that to mean that
9 there's no part of the work done in this lien for which a
10 waiver was not obtained. Is that right?

11 MR. KRAWCZYK: If you take the lien for what it says --
12 what it's cause is, which is the extras and changes, all
13 that work was done before Mr. Terlizzi got on the job and
14 lien orders were filed for those. Yes, Your Honor.

15 MR. COOK: Your Honor, my response to that is this.
16 The total contract price, even under their best case
17 scenario, which is they want to lock us into a \$225,000
18 contract, and there's plenty of reasons why that's not so.
19 But even if you take that, the lien waivers total \$130,000.
20 They've paid, by their own admission, \$221,000, which means
21 there's about \$91,000 that have been paid for which no lien
22 waivers have been given, which is substantially less than
23 the amount -- or substantially more than what we're seeking
24 on our mechanic's lien. Further, and I cite the cases in my
25 memorandum -- this was a typical situation. These were not

1 contemporaneously executed, Your Honor. If you look at the
2 affidavit that my client submitted, four of these were
3 signed at one time, and they're different from the dates
4 that were put on there, because it was basically a thing
5 where at one time when he had a draw they said sign all
6 these. So -- and also, he stated that, you know, a
7 situation where he owed suppliers and contractors and had to
8 sign it in order to get a draw. In the two cases that I
9 cited in my memorandum indicate that just because a lien
10 waiver is signed, depending on the circumstances in which it
11 is signed, it may not be enforceable. I think one is the
12 *Wilmes Trucking* case. And, Your Honor, I apologize. I
13 forget the name of the other case. That would be my initial
14 response to the lien we were issued.

15 But here's the more important thing, Your Honor. The
16 last lien waiver they've presented is dated March 2011. It
17 is undisputed that Mr. Terlizzi got more actively involved
18 in the job in May of 2011, which was two months after the
19 last lien waiver was signed. His deposition and his
20 affidavit state that he had discussions with the Bohelers at
21 that time and said, look, whatever this Mr. Harding guy told
22 you about how much the house could be completed for, it
23 can't be completed for that \$225,000 figure because of the
24 myriad change and add ons that they had done. And they
25 said, okay, fine, continue on. You also see that Mr.

1 Boheler, on July 22nd, signed something stating that he
2 would pay for the extras. So on at least two different
3 occasions the Defendant's have acknowledged responsibility
4 for these add ons and change that subsequent to the signing
5 of all of the lien waivers that the Defendants rely upon.

6 THE COURT: Okay. And let's get to the heart of the
7 matter. They say that your client testified in a deposition
8 that the original lien amount was filed not in good faith.

9 MR. COOK: That's not true, Your Honor.

10 THE COURT: Okay. What part of the depositions are you
11 all referring to that indicate that he's --

12 MR. KRAWCZYK: Let me -- can I address a few things,
13 Your Honor? I think it's important after Mr. Cook has
14 misquoted several cases in this matter.

15 THE COURT: Well, I'm more --

16 MR. KRAWCZYK: I don't know if that matters or not, but
17 here's -- here's what Mr. Harding -- or, excuse me -- and I
18 got all of the relative -- what I've got here, Your Honor,
19 is one, is a list of statements that I've made today and
20 their positions within the deposition. But what Mr.
21 Terlizzi testified to is that he did not have the actual
22 material and the labor costs associated with these change
23 orders and extras, that he went back in time and reverse
24 engineered what it should have cost, using square foot basis
25 and books. He made it up out of what might typically it

1 cost to do the work. And then, on top of that, he added his
2 overhead and profit of 55 percent. And so, what we're
3 saying is, he didn't go back and do an accounting and say,
4 okay, here are the receipts I have for material. Here are
5 the receipts I have for my labor. This is how much I have
6 in the job, and this is how much I've been paid. This is
7 what I'm owed in lien. He did not do that. He went back
8 and reverse engineered this job.

9 And let me step back again, Your Honor, and Mr. Cook --
10 in his affidavit, Mr. Harding was the man on the job. Mr.
11 Harding agreed to all of these things. To do them at no
12 extra cost. I mean, I know it gets beyond the -- and all
13 the things he's bringing up about these extra costs and
14 agreements, all are in the contract. None of it has
15 anything to do with the lien. Lien waivers are valid.
16 That's what they're for. There's no duress. The cases that
17 Mr. Cook cites, in one of them the guy signed a lien waiver
18 but never got paid. So of course the lien waiver is not
19 valid. And the other one there was some kind of duress. In
20 this one what's -- claiming duress. If you don't sign the
21 lien waiver we won't pay you for the work. Well, that's how
22 it works. That's what lien waivers are for.

23 Now, I'm going to hand you this case, *Yepsa*
24 *Construction, Inc. vs. Randazzo*, Your Honor. This case
25 says, "Unless the contract specifically outlines the

1 overhead and profit, that overhead and profit are not
2 lienable," period. That's the case. 2003. That's what
3 that case says, Your Honor. I mean, it's clear as day. All
4 of this, on top of the fact that his man on the job, Mr.
5 Harding, has sworn an affidavit that this is what he was
6 doing. So even if you ignore that, I've got -- I've got the
7 testimony where he says two things. He says, number one,
8 when I filed the lien I didn't use actual costs of material
9 and labor. He guessed. And it shows. There's 60 some odd
10 thousand dollar difference. The second was that he admits
11 that all the things he specifically puts in his lien, that
12 the costs and extras were for, were already done when the
13 lien waivers were signed. So once they find that out what
14 did they do? They changed their lien to a new theory. We
15 can't go with the theory of extras and change orders anymore
16 because we signed lien waivers for those. Those are valid.
17 So we're going to change our lien. Even though Mr. Krawczyk
18 asked us to do this two and a half years ago, we're going to
19 change our lien to what it should be two and half years
20 later. And it's obscene, Your Honor. And what my clients
21 had to go through the last two and a half years is
22 ridiculous --

23 MR. COOK: Your Honor --

24 MR. KRAWCZYK: -- when in 2011 they could have done
25 this exact thing and my clients could have bonded off a

1 \$48,000 lien and we could have litigated it. But that's not
2 what Mr. Terlizzi wanted. He wanted a lien so large that
3 the Bohelers wouldn't be able to bond it off. That's what
4 he was doing, and that's what this is -- I mean, I hate to
5 be that way. But roundabout it, that's what this case is
6 about. And guess what, subsequent to their -- subsequent to
7 Mr. Harding giving us that affidavit, he went to Mr.
8 Terlizzi and got an affidavit from him, and he never
9 recanted that statement. Subsequent to the date of that
10 affidavit, Mr. Terlizzi gave an affidavit. He doesn't
11 recant that statement. He doesn't dispute that statement.
12 There's no question of fact that his intent was to file a
13 lien larger than he was entitled to. Even if Your Honor
14 isn't willing to go that far, it is without dispute that the
15 basis for which he got his initial accounting was improper,
16 and all of the things in there were subject to mechanic's
17 lien waivers, period. So in 2011 I asked Mr. Terlizzi to
18 reduce his lien. He chose not to. Now he has to live with
19 the consequences, because my clients have.

20 MR. COOK: Your Honor, I'll reply whenever I --

21 THE COURT: Go ahead.

22 MR. COOK: -- whenever I can, if it's all right.

23 THE COURT: You have the floor.

24 MR. COOK: Thank you. Mr. Krawczyk's impassioned
25 speech about the harm to the Bohelers is certainly

1 compelling, except for the fact that when we filed the
2 stipulation of reduction in September I wrote to Mr.
3 Krawczyk and said whatever that needs to be done to assist
4 your clients, now that the bond amount would be reduced,
5 please let me know. That was six months ago, Your Honor.
6 They have not once asked for any assistance in reducing this
7 cash -- what is a claimed cash bond amount.

8 THE COURT: Well, it looks like that was done
9 automatically, because as soon as the lien was reduced you
10 wrote the clerk of court and the clerk of court refunded the
11 money. So --

12 THE COURT: Yeah, well --

13 THE COURT: -- you don't have to do anything.

14 MR. COOK: Well, if that's the case then, then I -- all
15 right.

16 THE COURT: I mean, is your client willing to pay the -
17 - the Bohelers the opportunity costs or the interest on the
18 money that they put up there because of his mistake?

19 MR. COOK: I don't think they're entitled to it, Your
20 Honor. The assumptions being made that the initial figure
21 was wrongful and not supportable. But we're in a summary
22 judgement motion hearing where the issue is going to be is
23 there a dispute of fact. And the affidavits filed by Mr.
24 Terlizzi alone create a material issue of disputed fact with
25 regard to these issues. We're not -- this motion does not

1 ask you for any equitable relief. It is not a motion made
2 in equity. It is a summary judgement motion asking you to
3 dismiss the mechanic's lien on the basis that there's no
4 material -- that there's no material issue of fact, and
5 that's simply not the case, Your Honor. I'm not aware of
6 any law, and I don't think Mr. Krawczyk has cited any, that
7 it -- many of the mechanic's lien cases I have been involved
8 in start off with one figure and end up with a different
9 figure.

10 THE COURT: I don't agree. I mean, I do agree with
11 that.

12 THE COURT: Yes, sir.

13 THE COURT: But here's what -- and let me just cut
14 straight to the chase. I agree that mistakes can be made.

15 MR. COOK: Yes, sir.

16 THE COURT: Addition mistakes, subtraction mistakes, or
17 whatever. And when those mistakes are in good faith that's
18 not a problem. I'm looking at this case and it's being
19 represented to me, and I think that the record supports,
20 that they said two years ago that this is the proper lien
21 amount. They said this is the proper lien amount.
22 Everything that they maintain in their memorandum is
23 consistent with their theory that the only reason that this
24 lien was filed was in an effort to put the Bohelers over a
25 barrel and to force a foreclosure. There seems to be an

1 absolute lack of good faith. And I understand we're at
2 summary judgement, but summary judgement doesn't require
3 this court to be naive. I dealt with a similar situation
4 over in Laurens County where it was a full payment defense.
5 And over and over and over again the party for the
6 homeowners said look at the checks, look at the checks. And
7 in this case it was a material supplier. Somebody who had
8 supplied them wood to the general contractor, and it was
9 during the heyday of construction, pre 2008 where every
10 contractor did what every contractor does and that is pay
11 the last job based upon the money that they're making on the
12 current job, and then all of a sudden when the house of
13 cards collapses you can't make payments to your suppliers
14 and the people who are building the house are the ones that
15 take it on the chin. But in that case the owners, it was
16 undisputed, had paid everything that they were required
17 under the contract and the change orders, and still the
18 supplier of the lumber would not back off. In that case, I
19 awarded fees to the homeowners, when it was all said and
20 done by way of summary judgement, and that was affirmed by
21 the court of appeals. And I'm having a hard time seeing
22 this as an honest mistake based on what has been presented
23 and the totality of the record as a whole. Clearly if your
24 client is entitled to additional payment, under quantum
25 meruit or some other theory, we can try that. But for your

1 client to file a mechanic's lien of this size, and in light
2 of the fact that all the other affidavits seem to be
3 consistent with their theory of why this lien was filed --

4 MR. COOK: Your Honor, may I -- I certainly clearly
5 understand what you're saying. It's not that I don't
6 understand that. I think at this stage what the court would
7 have to do is -- that affidavit that I handed you, Mr.
8 Terlizzi's affidavit about how that \$106,000 figure was
9 arrived at, Mr. Krawczyk in Mr. Terlizzi's deposition asked
10 him how was that figure arrived at, and that's what he's
11 talking about profit and overhead and loss and all of that,
12 Your Honor. Now, it is not -- and it came up to that
13 amount, Your Honor. And I don't know that the fact that my
14 client and I decide that it's better to go -- and it may be
15 more provable even from a net loss on the job case from one
16 that would have included profit and all. I don't -- Your
17 Honor, I guess my response would be that at a summary
18 disposition situation that I don't think it would be
19 appropriate to conclude that the only conclusion that can be
20 drawn from the way the lien was initially presented was that
21 it was done to harm the Bohelers because those numbers add
22 up. If you read Mr. Terlizzi's deposition, those numbers
23 are justifiable and supported as including profit and
24 overhead and all that type thing. These were not made up
25 figures, as Mr. Krawczyk has identified them. Now, they

1 may, in fact, be figures that would be difficult to win on
2 trial at, but that's not where we're at today. You're --
3 Mr. Krawczyk is asking you to dismiss the lien because those
4 figures were unsupportable. And my response to that is
5 there is evidence to support those figures. The fact that
6 we chose to go with different figures doesn't mean the court
7 has to conclude that the original figures weren't
8 supportable. That's my response, Your Honor.

9 MR. KRAWCZYK: Your Honor, that affidavit is not in
10 evidence in this case. As much as I don't care that
11 necessarily it is. Just on the record, that that affidavit
12 --

13 MR. COOK: Your Honor, it's already been submitted to
14 the court.

15 THE COURT: Well, since he's referring to it, just so
16 the record is clear, I'm going to allow it to be made a part
17 of the record in this case just so that we know what it is
18 that I'm looking at right now.

19 MR. KRAWCZYK: Sure.

20 THE COURT: But it's an affidavit that's dated November
21 the 7th of 2011 signed by Mr. Terlizzi.

22 MR. COOK: And that was submitted in the context of the
23 initial motion to dismiss the lien that was heard in this
24 court. And then if you pair that up with the deposition
25 cross-examination of my client by Mr. Krawczyk, he explains

1 how that figure was reached. And, you know, if you're
2 hearing this as the trial judge you might decide I don't
3 accept that calculation of damages. But at this point
4 that's not what you're being asked to do. You're being
5 asked to make a decision that that calculation is totally
6 unsupportable, and I submit to you that's not the case, Your
7 Honor.

8 THE COURT: All right. How is there not a scintilla of
9 issue?

10 MR. KRAWCZYK: Your Honor, the question isn't whether
11 it's supportable. The question is whether it's a proper
12 method of determining the amount for a mechanic's lien. Let
13 me -- if you would, Your Honor.

14 THE COURT: Sure. If that's the case then why wasn't
15 the lien removed back in 2011 when this affidavit was filed
16 and you all had the initial hearing? If it wasn't proper
17 back then --

18 MR. KRAWCZYK: Because --

19 THE COURT: -- the court should have reduced it at that
20 point in time.

21 MR. KRAWCZYK: -- Mr. Cook's defense at that time was,
22 Your Honor, this is summary judgement. We haven't done any
23 discovery. We haven't -- we didn't have the accounting
24 numbers. We don't know -- we didn't know then what we know
25 now. In his deposition, Your Honor, Mr. Terlizzi, "How did

1 you come up with your base cost?" "It's a good faith
2 estimate. I did not have -- when we originally did the -, I
3 did not have it. I hadn't purchased anything." "So it's
4 not -- the number is not based on what your material and
5 labor costs were?" "Not right then." So he also went back
6 and said on multiple occasions -- if you want to read the
7 deposition, Your Honor. I go over and over, this wasn't
8 based on actual material and labor. He reversed engineered
9 the job. Essentially saying, from a contract standpoint, if
10 I were to go back and charge somebody, this is what I would
11 charge them on a contract basis. That's just improper
12 method of putting a lien together. You're supposed to do
13 your accounting. Your Honor, in 2011 I begged them to do
14 the exact accounting that they ended up doing in discovery.
15 Tell me what your material and labor is so we can have a
16 proper lien. And they said no. And they said no because
17 they had no support in actual receipts in material and labor
18 to do that. I mean, I don't know what else I have to do as
19 far as counsel for somebody to try and make them aware that
20 this is an improper situation. And they took that risk
21 THE COURT: Let's approach this from a different
22 standpoint. The next question is for you.
23 MR. COOK: Yes, sir.
24 THE COURT: Let's assume for a moment a situation where
25 -- let's take what he's saying and take it to the logical

1 conclusion, that somebody just makes up a figure. Okay?
2 Just make up a figure. There's no doubt the money is
3 additional -- additional money is owed, because you have
4 change orders or what have you. They come up with a figure
5 and they say, let's see, probably in the neighborhood of
6 \$50,000, and they don't actually do what it is they're
7 saying should be done in the mechanic's lien, for that
8 matter, what I agree should be done under mechanic's lien,
9 and that is put together an actual number because these
10 people have to bond out. Okay? So that's the reason that
11 this creation of statute is specific. They come up with an
12 estimate, not based on any numbers. We get to the trial
13 phase. Okay. Instead of 50,000 it's actually 25,000.
14 You're still saying that I should -- despite their lack of
15 due diligence at the get go, that the court should still
16 permit a mechanic's lien to go forward and for it to be
17 tried on that basis despite the fact that the person who's
18 availing themselves in the mechanic's lien failed to do what
19 they needed to do at the outset. What would be your remedy
20 then? How do you fix that?

21 MR. COOK: Well, I'm not sure that I'm saying that, you
22 know, Your Honor. My answer would be several fold, one of
23 which is that statute. I think it's 29 500, I believe,
24 indicates that the inaccuracy of the amount claimed is not
25 the basis for dismissal of a lien. It presupposes that

1 there might be inaccuracies in the amount of the lien. The
2 only remedy statutorily is if it's knowingly and willfully
3 incorrect. And Mr. Terlizzi has explained under oath how he
4 arrived at that figure.

5 THE COURT: Right. But they're saying that they've
6 been begging you all for years to come down to the number
7 that you ultimately came down to. Is that not correct? I
8 mean, that seems a little suspicious.

9 MR. COOK: Yes. Well, I mean, I want --

10 THE COURT: You know, they say --

11 MR. COOK: -- to be forthright with the court. Did
12 they request that we reduce it? Yes. But what I'm telling
13 you, Your Honor, and those cases that I cited, that figure
14 is a supportable figure. The fact that we go with a
15 different figure later is not a disavowal that that was --
16 and I understand, and if I were in Mr. Krawczyk's position I
17 would probably make the same point, is that the reduction
18 itself shows that the initial amount was wrongful. I don't
19 accept that and I don't agree with that, Your Honor. The
20 fact that we go with a different figure for the purposes of
21 trying the case doesn't mean that the initial figure wasn't
22 supportable. He explained how he went about that. And the
23 figures are on the affidavit, Your Honor. I mean, these are
24 -- you know, this isn't one where he just puts in an amount
25 and you've got to guess how the figures were made. It

1 involves the contract amount, and the extras, the changes,
2 less what was paid.

3 THE COURT: But as I understand it, Mr. Terlizzi never
4 told the judge initially about the waivers of the liens.

5 MR. COOK: I don't even know that anybody was aware of
6 the waivers. I mean, I'm not denying that he signed those,
7 Your Honor, but we didn't keep copies -- we didn't keep
8 copies of them, and they were not presented as part of that
9 case.

10 THE COURT: I understand. But if he's in a partnership
11 with this other gentleman --

12 MR. COOK: We dispute that, Your Honor. We don't agree
13 with that.

14 THE COURT: Well, what are they then, if they're not
15 partners?

16 MR. COOK: Well, it could be a lot of different things
17 other than partners, Your Honor.

18 THE COURT: You're a partnership, you're a cooperation
19 or you're a sole proprietor. I learned that from John
20 Freeman under the heading of everybody's got to be somebody,
21 so...

22 MR. COOK: Except for the fact that you're presupposing
23 that everybody works -- that's working on a job has to fit
24 within one of those categories. He could be an independent
25 contractor, Your Honor.

1 THE COURT: What does the deposition indicate?

2 MR. KRAWCZYK: Your Honor, the deposition says he's a
3 friend. That's what it says.

4 THE COURT: There's no legal authority for a friend.

5 MR. COOK: Friendship. I agree with that, Your Honor.
6 Your Honor, in my brief, and in the affidavit of Mr.
7 Terlizzi there's a real question about what his authority
8 was on this job. There is no question that Mr. Terlizzi
9 knew he was working on the job. I'm not going to say that,
10 because that's just not true. But they want him to be Mr.
11 Terlizzi's agent so that all these things that were told by
12 Mr. Harding are reputable to Mr. Terlizzi, and that was not
13 the case, Your Honor. They're getting -- these things at
14 trial would be flushed out.

15 MR. KRAWCZYK: On trial for a contract case, Your
16 Honor. If we were just talking about numbers, Your Honor,
17 if we were just talking about a difference of five or
18 \$10,000 we wouldn't be here.

19 THE COURT: I know that.

20 MR. KRAWCZYK: We're talking about not only a
21 difference of \$60,000, but we're also talking about a sworn
22 affidavit from somebody who gives Mr. Terlizzi's intent.
23 We're talking about Mr. Terlizzi's deposition that he said -
24 - quite honestly Mr. Terlizzi didn't understand the purpose
25 of a lien, Your Honor. He thought he was entitled to

1 everything under the sun in the lien, but that's just not
2 the way the lien works. It's a statutory -- and I figured
3 as much in 2011 when we asked them to reduce it. Again,
4 when they asked him to just go ahead and file the
5 requirements of the statute they had all they needed. All
6 they had to do was figure out the numbers. And isn't it
7 convenient -- it's just convenient as a methodology of
8 strategy that our new lien just happens to be the amount
9 that is the actual requirements under the statute. I mean,
10 I just -- you have to take it all into account, Your Honor,
11 as a whole.

12 THE COURT: What is their remedy if they're right?
13 They counter-claimed against you. But he's had to take
14 Social Security early. He's had to do all these other
15 things.

16 MR. COOK: Your Honor, those are representations.
17 Those aren't proven.

18 THE COURT: Assuming -- assuming they're right. That's
19 the assumption. Assuming that they're right, okay, and at
20 trial and they had to go through all this, and I allow your
21 mechanic's lien to go forward --

22 MR. COOK: Yes, sir.

23 THE COURT: -- what is their remedy for the wrongful --
24 let's assume for a second that they're correct. That there
25 was a conspiracy between these two people to force a

1 foreclosure on this house, and that your client did it
2 maliciously and in bad faith and just because he's a
3 downright dirty scoundrel and shouldn't be able to breath
4 the air that sustains him. Okay?

5 MR. COOK: And that's the impression that I've gotten.

6 THE COURT: Right. Well, I understand. No, no, no.
7 That's their side of it. What's the remedy that they have?

8 MR. COOK: Well, their remedy was to file the motion to
9 dismiss, which they did and which was denied, Your Honor.
10 Let's keep cognizant of that.

11 THE COURT: But that was so -- that was so early in the
12 litigation. From my review of the law I can't see -- I
13 understand that there are issues of fact that go to the
14 issue of contract and some other things. Your brief was
15 clear on that. But, you know, again, it's a mechanic's
16 lien. The creation of statute has to be strictly complied
17 with. And again, assuming that they're correct and I allow
18 the mechanic's lien cause of action that your client has
19 filed to move forward and the jury ultimately concludes that
20 everything they say is right, what would be a remedy that
21 the court could fashion? And I say that -- I say that to
22 say the remedy has to be now as opposed to at trial, because
23 we go through trial --

24 MR. COOK: I understand what you're saying.

25 THE COURT: Yeah. I mean -

1 MR. COOK: I think I have an answer for that, Your
2 Honor. Well, first of all, if we are -- if we lose at trial
3 on the mechanic's lien cause of action, they're going to be
4 entitled to statutory attorney's fees. They have brought, I
5 don't know, six, seven, eight counter-claims against my
6 client for fraudulent conduct and the like. If at trial the
7 mechanic's lien was found -- was not awarded and their
8 counter-claims were the very damages that they say that they
9 need to get in order to be made whole are going to be
10 available to them, as the damages -- and they've not only --
11 Your Honor, and this -- talk about -- it's all sort of been
12 one-sided what you've heard, and there really are two sides
13 to this case, Your Honor. But they have brought counter-
14 claims against Mr. Terlizzi individually even though the LLC
15 was the --

16 THE COURT: I saw some objection --

17 MR. COOK: Yes, sir.

18 THE COURT: -- has been denied on that. So talking
19 summary judgement, that's already been decided.

20 MR. COOK: So that's their remedy, Your Honor. If
21 everything they say pans out after trial on the issues,
22 they're going to get their attorneys fees on the mechanic's
23 lien cause of action, and presumably if they've incurred
24 additional expenses because of what they've alleged are
25 wrongful fraudulent actions of Mr. Terlizzi, they're going

1 to be awarded a judgement against him for that amount. My
2 point is would that not be more appropriate to do after a
3 full exposition of the facts, where people actually testify,
4 rather than doing it at this stage? Because the same result
5 is going to occur if you grant summary judgement to the
6 Defendants today. They're going to be -- they're going to
7 move for their attorneys fees, and then the only trial
8 issues are going to be the counter-claim against Mr.
9 Terlizzi knowing that the mechanic's lien has already been
10 dismissed. And my point is, we're in a summary judgement
11 motion, Your Honor. Would it not be more appropriate to
12 have a full trial on all these issues? They're not losing
13 anything if you denied summary judgement motion. They're
14 not losing a thing. We're under a consent scheduling order
15 that sets us for a trial, what, no later than, I think,
16 right after May 31st, I believe.

17 MR. KRAWCZYK: Your Honor, would Mr. Cook have us
18 believe that summary judgement motions have no basis or
19 bearing, as long as he gets up and says that there's a
20 question of fact? The truth of the matter is, it's one-
21 sided today because he hasn't presented one scintilla of
22 evidence to discredit anything we've said. All I have done
23 is taken Mr. Terlizzi's deposition and quoted it, and quoted
24 the affidavits that we submitted and which Mr. Cook
25 submitted. They all lead to one conclusion. That

1 conclusion is that Mr. Terlizzi filed an improper lien,
2 period. Now, whether he's entitled to contract damages,
3 whether he's entitled to that, he did not follow the
4 guidelines of the statutes. He didn't. And there's no
5 evidence to the contrary. None. Not one bit of -- Mr.
6 Terlizzi's testimony, not one thing from John Harding,
7 nothing. That's why it's one-sided. Do you think he
8 wouldn't have put that up if there had been any of that
9 evidence? Of course he would.

10 Your Honor, I think Your Honor has the gist of what's
11 going on here, and I understand summary judgement is a
12 difficult thing. But sometimes it's necessary. And this is
13 so flat out one-sided because that's the way it happened.
14 You cannot file a lien based upon estimates, have the
15 Bohelers come up with \$140,000 to bond it off, and then
16 later on say, oh, sorry. I know you've told us that this
17 was an improper lien, but now, two and a half years, we've
18 decided to fix that. That's what Mr. Cook wants you to
19 believe. That's it in a nutshell, you know. And so, we
20 have a remedy. The remedy is the dismissal of this
21 mechanic's lien and all that goes with it. Mr. Terlizzi and
22 his counsel were warned of that in September of 2011 and
23 they chose to ignore it. I'm sorry. That's the way it is.

24 MR. COOK: Your Honor.

25 THE COURT: Yes.

1 MR. COOK: May I reply?

2 THE COURT: Sure.

3 MR. COOK: There's a point, too, that I had intended to
4 make initially that -- you started asking some --

5 THE COURT: Sorry to throw you off track.

6 MR. COOK: No, you didn't throw me off track, Your
7 Honor. But I always like to go where the judge wants to
8 have answers. At least I try to. What you've not heard,
9 Your Honor, is the only -- the only written agreement about
10 this particular situation is a contract dated April 30th,
11 2010. The testimony of Mr. Boheler was that that was done
12 just to get a tax credit that had to be done by that date.
13 It was a \$6,500 -- I think it's a new house construction tax
14 credit. And that when he signed that contract he knew that
15 there would be new plans, and he knew that there would be
16 changes. In his deposition he even calls it a tentative
17 contract. There's actually no dispute, and Mr. Boheler
18 acknowledges this in his deposition, that plans -- a new set
19 of plans were made that involved the addition of all those
20 changes and extras that you've seen that Mr. Terlizzi is
21 claiming that he should be paid for. The reason why all
22 those happened is the initial contract didn't take into
23 account the special requirements of Mrs. Boheler, who is
24 apparently wheelchair bound, or uses a wheelchair much of
25 the time. So once that \$225,000 figure was arrived at, it

1 was known by the parties that that was not going to be the
2 actual cost of construction, and because hallways had to be
3 widened, doorways had to be widened -- and in my brief I
4 cite numerous things that Mr. Boheler acknowledged had to be
5 changed over the initial bid amount. Now, their theory is
6 that Mr. Harding told them all along, don't worry about
7 that. We're going to try to get it in at under \$225,000.
8 However, Mr. Terlizzi's testimony is that when he got
9 actively involved in May, after the lien waivers, after all
10 that, he told them, that ain't going to happen. You're not
11 going to get this house for 225,000. All of these extras
12 and additions are going to cost money. And that they were
13 content for him to come on and take over the job on that
14 basis. The affidavit of Mr. Terlizzi also indicates, and
15 you've got it in front of you, the acknowledgment from Mr.
16 Boheler dated July 22nd, 2011, that they would pay for all
17 of these extras and change orders, Your Honor. What you've
18 also not heard is that at the end of the job they
19 shortchanged Mr. Terlizzi on the last draw. Under the
20 contract, assuming that some articles of the contract still
21 remain, he was allowed to stop work and then they fired him.
22 So, Your Honor, my point is this. There is a lot of
23 ambiguity about what is the contract. There is a written
24 contract, but everybody seems to have been operating under
25 the assumption that it wasn't going to be binding on

1 anybody. Mr. --

2 THE COURT: I don't disagree about the contract. I'm
3 talking about the mechanic's lien --

4 MR. COOK: Yes, sir. And I'm getting there.

5 THE COURT: -- and that's a different animal.

6 MR. COOK: And that had to be said to make my next
7 point, Your Honor, which is this. All of that stuff that is
8 mentioned in the affidavit that was -- that I showed you are
9 these extras and things. And my point is this, Your Honor.
10 They're all -- they're all agreed to. There's going to be a
11 dispute. They're going to claim they don't owe him. And
12 Mr. Terlizzi is going to say I made it clear that I couldn't
13 do it for that. But all of that work was done on the house.
14 That's undisputed. I don't understand the Bohelers to claim
15 that none -- that anything other than all of that was done.
16 And my point is, that initial lien amount is based upon that
17 work. And Mr. Terlizzi in his deposition states what he was
18 including in that. That does not make it a lien that the
19 only remedy, when they ask you to do it, is that you dismiss
20 the lien. We've already -- we have adjusted the amount,
21 Your Honor.

22 THE COURT: All right. I'm going to have to look at
23 Mr. Terlizzi's deposition. You said you have the portions
24 that you want me to pay attention to. I assume that you've
25 -- is that the full depo or --

1 MR. KRAWCZYK: It is the full --

2 THE COURT: If you can give me -- if you can give me
3 the full deposition. And I know that you've pointed to
4 certain portions in your motion.

5 MR. KRAWCZYK: I'll give a copy to counsel.

6 THE COURT: Sure.

7 MR. KRAWCZYK: This is just --

8 MR. COOK: I mean, I have the deposition. I don't need
9 a copy of it.

10 MR. KRAWCZYK: Well, this is -- I'm going to hand this
11 up to the judge, too, which is just going to help him find
12 some pages.

13 THE COURT: This is something you prepared?

14 MR. KRAWCZYK: It's something that I prepared. I guess
15 I don't know --

16 MR. COOK: Your Honor, I thought both sets of
17 depositions were provided to the court in the context of the
18 summary judgement motion. But those may actually be in your
19 -- in the court's file. I don't know.

20 MR. KRAWCZYK: I guess the only problem that I have at
21 this point, Your Honor, is everything that Mr. Cook just
22 said is unsupported by any testimony. He hasn't cited a
23 single deposition. He hasn't provided a single affidavit.
24 Any of this stuff that he just said. And --

25 MR. COOK: Your Honor, I take exception to that, Your

1 Honor.

2 MR. KRAWCZYK: And so, I just -- you know, just looking
3 at the court, say look, my client could have promised a
4 million dollars to pay for this house --

5 THE COURT: Agreed.

6 MR. KRAWCZYK: -- but he's not entitled to lien for a
7 million dollars.

8 THE COURT: Agreed.

9 MR. KRAWCZYK: Whatever this agreement they had has no
10 bearing on the mechanic's lien at all.

11 THE COURT: And I agree with you, and here's why. If
12 you look at the statute, a lien can be discharged if the
13 amount filed was willfully and knowingly wrong. Willfully
14 or knowingly inflated. You can prove willfulness by way of
15 conscious disregard for the truth, or recklessness, or I
16 really don't care, I'm going to throw a number on a piece of
17 paper. And I'm familiar with the law that you have cited,
18 and I'm very sympathetic to the Defendant in this case, in
19 all candor, because I'm hearing that they've been asking
20 since the inception of this case for the lien to come down
21 to what it ultimately did come down to. The court does not
22 have to be naive. There's a difference between bonding out
23 for 44,000 and bonding out for 100 and --

24 MR. KRAWCZYK: Six.

25 THE COURT: -- 6,000. That's a big different. The

1 Defendant in this case should not have had to do that, by
2 the Plaintiff's own admission. So I've got a problem with
3 that. The question is whether it was knowing or willful. I
4 realize there's an issue on who these parties are, whether
5 it was a partnership or just friends, and I understand that
6 there may be other issues involved in this case. But
7 knowingly and willfully is the standard the court has to
8 apply. That's why I want to look at the deposition and see
9 straight from the horse's mouth how he came by these
10 figures. If it turns out that the method he used to
11 calculate this was wholly unsupported in the law, I think
12 that's sufficient to demonstrate knowingly and willfully,
13 especially since the error was brought to the Plaintiff's
14 attention at the time the initial lien was filed. So that's
15 where I am.

16 MR. COOK: Yes, sir. And that's why I cited those
17 cases about the inclusion of profit and overhead. Those are
18 appropriate.

19 THE COURT: They can be appropriate.

20 MR. COOK: They can be, exactly. But I think -- I
21 think they can be appropriate would certainly go into
22 willfulness and knowingly, Your Honor.

23 THE COURT: But if they're in the -- like he says, if
24 they're in the contract, it's appropriate. Otherwise, the
25 purpose of the mechanic's statute is to make sure that the

1 builder doesn't take a bath. And when they got a homeowner
2 who all of a sudden wants to take, you know, an issue with
3 the punch list because, you know, the light fixture is not
4 exactly the kind that they picked out. You know, this is
5 not a case like that. This is something entirely different.

6 MR. KRAWCZYK: And, Your Honor, just to add to that. I
7 think you -- you're not even required to find willful
8 intent. I think the other thing you might just be required
9 to do is to look at the initial lien and the basis for the
10 initial lien not being an actual material and labor used in
11 the job. That's another basis for you to look at it. But -
12 -

13 MR. COOK: Well, one court's already done that, Your
14 Honor.

15 MR. KRAWCZYK: No. And, Your Honor, please, if we get
16 off that particular subject --

17 THE COURT: We're post discovery now. Okay? The court
18 --

19 MR. COOK: Well, I understand that. He's talking about
20 the initial lien. He's saying -- he backed in that should
21 have been done that way. That's his argument.

22 THE COURT: And that's probably one of the strongest
23 arguments he can make is that it should have been done back
24 -- the way that you ultimately decided to reduce -- or the
25 way that your client ultimately decided to reduce his lien

1 to. It should have been that amount from the beginning.
2 And the very fact that he used this inflated figure is
3 evidence to demonstrate the willfulness and the knowingly
4 improper lien being filed. I'm reading straight from the
5 law. "By showing that the filer of the lien has willfully
6 and knowingly claimed more than is due." So that's -- so
7 let me -- yeah, I need to look at the deposition. I'll take
8 it under advisement and I'll let you all know.

9 MR. COOK: Is that Mr. Terlizzi's deposition?

10 MR. KRAWCZYK: Mr. Terlizzi's deposition.

11 MR. COOK: Your Honor, I would also hand up to you --

12 THE COURT: Sure.

13 MR. COOK: -- Mr. Boheler's deposition so it's in the
14 court's file, although you may already have it. I do not
15 know.

16 THE COURT: Give me an opportunity to do a little light
17 reading tonight.

18 (Whereupon, the proceeding was concluded.)

19

20 - - - END OF TRANSCRIPT OF RECORD - - -

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1 Certificate of Reporter

2
3 I, the undersigned, Tara T. Scott, Official Court
4 Reporter for the Eighth Judicial Circuit of the State of
5 South Carolina, do hereby certify that the foregoing is a
6 true, accurate, and complete transcript of record of all the
7 proceedings had and evidence introduced in the trial/hearing
8 of the captioned case, relative to appeal, in the Court of
9 Common Pleas for Newberry County, South Carolina, on the
10 12th day of March, 2014.

11 I do further certify that I am neither of kin, counsel,
12 nor interest to any party hereto.

13
14
15 Tara T. Scott

16 Tara T. Scott, CVR

17 Circuit Court Reporter

18 Newberry, South Carolina

19 February 15, 2015
20
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22
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STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS

TERLIZZI HOME IMPROVEMENT)
LLC,)

2012-CP-36-00090

PLAINTIFF,)

-VS-)

MICHAEL L. BOHELER, ET AL,)

DEFENDANT.)
_____)

TRANSCRIPT OF RECORD

MAY 8, 2014
GREENWOOD, SOUTH CAROLINA

B E F O R E:

THE HONORABLE FRANK R. ADDY, Jr., JUDGE

A P P E A R A N C E S:

ATTORNEY FOR PLAINTIFF:

ROBERT M. COOK, II, ESQUIRE

ATTORNEY FOR DEFENDANT:

CHARLES A. KRAWCZYK, ESQUIRE

TARA T. SCOTT, CVR
CIRCUIT COURT REPORTER

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EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>
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(No exhibits were introduced during this hearing.)

1 THE COURT: I believe that we're back on the record.
2 This is actually a Newberry County case. It's 13-CP-36-90.
3 And this is Terlizzi, T-e-r-l-I-z-z-I, Home Improvement
4 versus Boheler, B-o-h-e-l-e-r. And this is the Plaintiff's
5 motion, I believe, concerning the mechanic's lien. I've
6 ruled previously that the lien should be dismissed. I think
7 I also ordered that -- or the order that I signed reflected
8 personal liability on behalf of Mr. Terlizzi who had filed
9 the lien. And it's clear, obviously, that this hearing is
10 not -- and fees and costs are also an issue in this hearing.
11 Obviously if I stick -- or when I stick with the order this
12 will be appealed. This is without prejudice, obviously, to
13 the objection to the initial order. So let me here from you
14 all on the issues that we have here today. Okay?

15 MR. COOK: Your Honor, may it please the court. I'm
16 Robert Cook here on behalf of Terlizzi Home Improvement, the
17 Plaintiff. Your Honor, my understanding is, based upon the
18 emails from your office and the initial Form 4 order, is
19 that the order that had been submitted to you upon request
20 by Defendants' counsel you had indicated that you had no
21 problem with it and that you would sign it, but that you
22 would give me a chance with regard to the attorney's fee
23 issue.

24 THE COURT: Right. Correct.

25 MR. COOK: Your Honor, I see there being two issues

1 today with regard to the attorney's fees. At first is the
2 issue of the personal liability of William Terlizzi for
3 those attorney's fees, and secondly is the amount that's
4 being requested reasonably. And I'd like to approach them
5 in that order, if that's okay --

6 THE COURT: Please.

7 MR. COOK: -- with Your Honor.

8 THE COURT: Sure.

9 THE COURT: Your Honor, the argument with regard to Mr.
10 Terlizzi himself not properly being personally liable really
11 is -- will be a fairly short one. I have looked at the
12 mechanic's lien statute. I did not see anything within the
13 mechanic's lien statute that provides for attorney's fees to
14 be assessed against a non-party to the mechanic's lien.
15 There's no dispute that Mr. Terlizzi was not a party to the
16 mechanic's lien action. It was brought in the name of the
17 LLC. I don't see any provision within the mechanic's lien
18 statute to provide that if a mechanic's lien is brought by
19 an LLC that the member, or members of the LLC can be held
20 personally liable for attorney's fees if, in fact, they are
21 awarded against the LLC. So I would state that it's pretty
22 clear, and it's certainly been argued by counsel on the
23 other side, that the mechanic's lien statute must be
24 strictly construed and strictly followed, that there simply
25 is no provision within that -- within Title 29 to do what

1 the court has indicated that it would like to do.

2 Additionally, Your Honor, within the proposed order,
3 the only citation of law that was provided within this
4 proposed order in support of holding Mr. Terlizzi personally
5 liable was the citation to the 16 *Jade Street* case. And
6 that's at the bottom of page five of the proposed order.

7 Your Honor, there are two opinions in that case. The
8 one that has been cited in the order is the 2012 opinion.
9 That opinion was withdrawn by the Supreme Court. Can I
10 approach and hand you the correct opinion?

11 THE COURT: My clerk just handed it to me. It came out
12 in August of 2013. Is that the one that you have?

13 MR. COOK: Yes, sir. And -- yeah, August 28, 2013.
14 And in pertinent part, Your Honor, that -- the first
15 paragraph of that replacement order states, "Although this
16 cases poses the novel question of whether the Uniform
17 Limited Liability Company Act shields an LLC member from
18 personal liability from his own torts, we save that
19 discussion for another day." And a couple pages later they
20 specifically state that they're withdrawing the previous
21 opinion and issuing this one. So there is no law in this
22 state that permits this to be done, because what was being
23 purportedly handed to you as the law in the state, in fact,
24 isn't. And essentially, Your Honor, that's my argument. He
25 was never a party to the mechanic's lien action. There's no

1 provision within the mechanic's lien action to allow
2 personal liability against a non-party. And the case law
3 doesn't support it, in light of the fact that the opinion
4 relied upon by opposing counsel has been withdrawn and
5 substituted with an opinion that states they're not
6 addressing that issue.

7 THE COURT: All right. What do you -- what's your
8 response to that, and --

9 MR. KRAWCZYK: Well, first of all, I'd like to
10 apologize to the court. This morning, as I was shepardizing
11 my cases for today, I discovered the 2013. We had initially
12 done that research for a previous memorandum that was done
13 and we just brought it over. So part of what Mr. Cook says
14 is correct. That case was -- was substituted with the 2013
15 case. However, the arguments within the 2012 case, if I
16 were to sit here and argue with it today, Your Honor, is
17 exactly what the court -- the court was went in great depth
18 and detail and analysis of the LLC statute in the 2012 case
19 in which it said the only reason -- the only tort liability
20 in which the LLC statute, like the corporation statute, like
21 all the other statutes, the only liability -- tort liability
22 it shields you from is from vicarious liability. So if Mr.
23 Cook and I have an LLC together and Mr. Cook runs a red
24 light and has an accident while in the course of his duties,
25 I can't be held responsible solely for the reason of being a

1 member of the LLC. That's not what we have here.

2 What we have here is a contractor signing an affidavit
3 -- personal affidavit. If you look at it, it says
4 "personally here before me," swearing that the accounting
5 and that the mechanic's lien in and of itself is correct.
6 And as this court correctly decided, it was not correct. In
7 fact, it was intentionally, willfully, wrongfully sought
8 more money than he was entitled to. And so, what Mr. Cook
9 would have you believe is that you can have an intentional
10 act in this case, which is what the statute requires. An
11 intentional wrong, an intentional tort, and hide behind the
12 LLC statute for your intentional action. And even if --
13 even if there was -- the only tort liability ever discussed
14 in any of the *Jade Street* cases as even being a possibility
15 of being shielded in other jurisdictions is ordinary
16 negligence. And this goes above and beyond ordinary
17 negligence, I think Your Honor knows. Also, it's
18 interesting that an LL -- first of all, an LLC can only act
19 by and through --

20 THE COURT: Its officers.

21 MR. KRAWCZYK: -- its officers and its members. And in
22 this case, Mr. Terlizzi. So an individual -- that does not
23 shield it from individual tort liability. And specifically,
24 in order to file a mechanic's lien in this state you have to
25 be a licensed contractor. And a licensed contractor has to

1 state and verify the fact that this lien is correct. So --
2 and, in fact, 29-5-15 says a contractor who files a
3 frivolous lien is subject to a fine of up to \$5,000. Now,
4 that doesn't create a private cause of action from my
5 client, so obviously we didn't sue under that statute. But
6 I think that shows the intent of the mechanic's lien statute
7 that if you file a frivolous lien, or in this case, you file
8 a lien for the purpose for which this court found which was
9 to hold the Bohelers over a barrel, I think that personal
10 liability is not only warranted, it is intended by the
11 statute.

12 So I think it's important for the court to understand,
13 yes, I think the withdrawn -- the *Jade Street* case having
14 been withdrawn does not make that particular case precedent
15 here, but its arguments and its findings, which are clear,
16 are persuasive. And, if Your Honor -- if I were arguing
17 this fully today, they are the exact arguments that I would
18 be making. If you would look -- if you look at that *Jade*
19 *Street* opinion, it follows through that in order for there
20 to be common law -- the common law always has been that you
21 have the right to sue your tort feasons. And that's been
22 written into the corporate statutes, and where shareholders
23 and officers cannot be held liable for the obligations of
24 the shareholder unless it's of their own making. Unless
25 it's a tort of their own making.

1 In order to -- in order for the statute to change the
2 common law, or derivate from the common law, it has to
3 specifically address that. And the statute, which Mr. Cook
4 is relying on, says that a member cannot be held liable
5 solely for the purpose -- or solely by the fact that they
6 are a member of the LLC, which the court in the original
7 *Jade Street* -- which Mr. Cook also put in his original
8 memorandum in our first motion for summary judgment -- it
9 wasn't before you, Your Honor, did state specifically that
10 the only liability that's meant to protect somebody from is
11 liability that is vicarious liability and not the actual
12 torts or negligence by the individual themselves. So
13 therefore, you know, the Coke driver driving the Coke truck
14 is not -- can be held liable for the LL -- or whatever LLC
15 he's working for. Sure the LLC is liable for an accident he
16 gets in, but he's also personally liable for his torts. And
17 what the court found in the *Jade Street* opinion, although
18 not binding but its certainly persuasive, was this is --
19 this was not intended by the general assembly in the
20 statute.

21 So it brings me back to here -- brings me back to the
22 situation that we're talking about. We're talking about
23 what the court saw was not only was there not evidence for
24 the -- for the amount of lien sought, but there was direct
25 unrefuted testimony from the partner of Mr. Terlizzi who -

1 who says, look, he came here for this very purpose. He told
2 me this is what he was going to do. He was going to hold
3 the Bohelers over the barrel and he was going to create a
4 lien so large that they could not bond it off. As a result
5 -- and that was his intent in filing that lien. And that
6 was -- and the court found those are facts that are not in
7 dispute. So this is a willful, wanton, intentional act, and
8 Mr. Terlizzi cannot hide behind his liability to the LLC for
9 that act just because he claims to be acting on --
10 otherwise, what would stop any contractor from doing exactly
11 that. Having an LLC with no assets in it and being able to
12 thwart the court and to file improper affidavits and what --
13 you know, where does it stop. And that's, again, the reason
14 for the common law that you can't commit torts within the --
15 within the confines of your -- within the confines of your
16 work and be shielded from liability for your personal torts.

17 So I guess I don't know if I responded to both parts of
18 it, Your Honor. But I think both the statute allows for it
19 and the LLC statute does not shield him from his -- this
20 isn't normal negligence. This is his intentional tort.

21 THE COURT: Well, I know that the original *16 Jade*
22 *Street*, when that decision came out, it was subject to a lot
23 of criticism because -- I think Beatty originally wrote that
24 opinion. Justice Beatty did. And a lot of the criticism
25 was focused on the what part of limited liability don't you

1 understand line of reasoning. But they do have a point, or
2 there is a point to be made that if you're distinguishing
3 between intentional conduct or willful conduct that's
4 different from the ordinary negligence or the common
5 negligence that you had in *16 Jade Street*, isn't it?

6 MR. COOK: It may be, Your Honor. And as a theoretical
7 matter, I guess my question is, my statement is, the fee
8 shifting provision of the mechanic's lien statute, that's
9 what we're talking about here. They have brought claims
10 personally against my client that have yet to be
11 adjudicated. So this isn't a situation where the only
12 possible relief they could have is by -- and I argued this
13 to Your Honor at the original hearing.

14 THE COURT: I think I may have forgotten about that.
15 You're right. I do recall now, yeah.

16 MR. COOK: And the original *Jade Street*, I mean, that's
17 been totally disavowed by the Supreme Court.

18 THE COURT: Right.

19 MR. COOK: To say that I agree with that line of
20 reasoning and that supports my -- you know, that's not their
21 line of reasoning anymore. My point is, Your Honor,
22 although LLCs may have come into existence in South Carolina
23 after the mechanic's lien statute was developed, clearly
24 corporations existed at that time. If the legislature had
25 intended to have those type of entities pierced for

1 attorney's fees purposes they would have put that in the
2 mechanic's lien statute. They chose not to. Now we have a
3 new creature, the LLC. The Supreme Court has backed away
4 from saying that there's personal tort liability for that.
5 But that's not the question. The question is the fee
6 shifting statute. Does that provision allow for personal
7 liability in the face of the fact that they've got tort
8 claims already pending against them anyway. And I don't
9 believe that there's any statutory support for it, Your
10 Honor.

11 MR. COURT: Refresh my memory. What other claims are
12 pending against Terlizzi -- Mr. Terlizzi individually that
13 would allow for fees? I assume your breach of contract or -
14 -

15 MR. KRAWCZYK: The breach of contract.

16 MR. COOK: I think there was an Unfair Trade Practices
17 Act.

18 MR. KRAWCZYK: Yeah, the Unfair Trade Practice has been
19 dismissed.

20 MR. COOK: I thought it was the tortious interference
21 of contract is what you --

22 MR. KRAWCZYK: Yeah, that's been -- both of those have
23 been dismissed.

24 MR. COOK: Well, it hasn't. Are you dismissing it by a
25 stipulation now?

1 MR. KRAWCZYK: Well, no. I'm trying to recall off the
2 top of my head. We had a motion, Your Honor, in front of
3 Judge McMahon. It was Plaintiff's motion to dismiss his
4 client and dismiss several causes of action. The Unfair
5 Trade Practices claim I believe was dismissed. If not, I
6 may have probably just told them that I'm waiving that
7 anyway. I mean, if that's an issue it's not before the
8 court.

9 THE COURT: I don't know how you -- it would be hard to
10 prove public impact.

11 MR. KRAWCZYK: Yeah, well, part of -- part of this,
12 Your Honor, started from the fact that if you actually look
13 at the discovery responses that it was part of our thought
14 it was -- it was never -- in Mr. Terlizzi's deposition, it
15 was never his intention to ever be involved in this job,
16 period. He was lending his license to his friend. Okay?
17 And so, one of our causes of action is a breach of contract
18 with a fraudulent act and, you know, basically license
19 lending type of cause of action which -- you know, whether
20 or not that applies, that's different than this.

21 This is a different harm, Your Honor, and this is a
22 different intent by the -- than all of those things. A
23 breach of contract and all those losses, those actual
24 damages aren't compensated for the issues and the purposes
25 of this particular 29-5100 which says that if you

1 intentionally -- and the statute is very clear. They
2 created essentially a fraud cause of dismissal for a
3 mechanic's lien. And it couldn't be any more clear in this
4 case that that's exactly what happened. That you had a
5 contractor at the end of the job who says rather than deface
6 the Bohelers I'm going to put a lien so big on this they'll
7 never dig out from underneath it and that -- the purpose was
8 to have a handle or whatever to beat the Bohelers with and
9 they're going to have to come and deal with us. Okay?
10 There's no -- there's no other question that this was an
11 intentional act. Okay? Not only was it an intentional act,
12 it's an illegal act because it's in direct violation of the
13 statutes as the court has found. So it is an ultra vires
14 act by its very nature. Okay? So he cannot be acting on
15 behalf of the corporation as he does that. So Mr. -- Mr.
16 Cook wants to say, well, we're going to forget about ultra
17 vires act and responsibilities as per this statute because
18 they didn't specifically address it. Well, of course not.
19 They don't have to address every specific issue in that,
20 Your Honor. But the statute is clear that it is required
21 and it is a personal obligation because it doesn't go to the
22 corporation, it goes to the contractor who's worked on the
23 job and who is licensed and who has these -- who's given
24 this very powerful external outside the court system process
25 by which he is able to protect his interest. And it is a

1 very -- it's an extreme remedy in the law, if you think
2 about it, Your Honor, because there's no due process
3 necessary to bind all this, so my clients have to come up
4 with \$143,000. And instead -- and so, they're very specific
5 that if you either file a frivolous lien or file a lien in
6 which -- in which you seek -- intentionally seeking more
7 money than you're due, you're going to be subject to
8 attorney's fees. And because that is an obligation --
9 because you can only file this as a contractor. Now -- and
10 this isn't a case where the contractor had his foreman file
11 it. I don't even know if that's possible. I think it has
12 to be the contractor himself signing the lien. This is
13 where the actual affidavit and the lien is signed by Mr.
14 Terlizzi. And he files another affidavit later -- and I
15 think it's also important to understand, Your Honor, is from
16 the very beginning all of this was pointed out to Mr.
17 Terlizzi by me, through his counsel. We actually had -- I
18 attempted very early on, with the affidavit of Mr. Harding
19 and everything else, to have this lien dismissed for the
20 very same reason. The defense was, this is like a Rule 60
21 motion and we haven't had discovery, but --

22 MR. COOK: Your Honor, none of this goes to the issue
23 that --

24 MR. KRAWCZYK: Well, let me finish.

25 MR. COOK: -- is in front of you, Your Honor.

1 MR. KRAWCZYK: If the judge doesn't want to hear
2 anything else, he can tell me.

3 So it goes to the fact that this has been a one
4 continuous situation and a continuous fraud by Mr. Terlizzi
5 from the beginning to end. And what Mr. Cook would have you
6 believe is the fact of that fraud was done ostensibly in the
7 name of an LLC, of which he's the only member, he is
8 shielded from personal liability for that. And I think --
9 and I argue, Your Honor, I think both -- both the common law
10 in the statute and the mechanic's lien statute all address
11 that in one form or another.

12 MR. COOK: Your Honor, may I? Here's what I reply to
13 that, Your Honor. If that part of the mechanic's lien
14 statute provides for dismissal of a lien on the basis that
15 you find, that with all due respect I don't agree with, but
16 you found that, it says you can dismiss it on that basis.
17 If they had intended for there to be personal liability in
18 those cases it would have been addressed within that part of
19 the code and it's not, Your Honor. It's totally silent. It
20 just talks about against party. The party is the LLC.

21 THE COURT: I don't disagree with you, and I understand
22 that there's no law out there. He raises a valid practical
23 point. A lot of these -- and, I mean, gentlemen, you know,
24 we all had to wade -- wade through the housing collapse of
25 2008 and the feast and famine that went on with the

1 contractors, but most of these guys were paying the previous
2 job with the draws from the second job. So they were cash
3 poor, and that's putting it lightly. A lot of contractors,
4 a lot of LLCs, you know, went under when the housing market
5 crashed and they had no money. The bonding requirements on
6 a regulatory level for contractors is barely sufficient to
7 protect anybody out there, and that's the initial -- or
8 that's the initial purpose of even having a bond. But the -
9 - even if they're bonded, it's not enough money to protect
10 somebody who is usually injured because of their negligence
11 or what have you. So when he says, look, it took 20,000,
12 30,000, \$40,000 to defend this and to get to where we are,
13 in light of the fact that he can't bring some of these other
14 causes of action, like Unfair Trade Practices, where you
15 could get attorney's fees, you can't bring those because
16 there's no public interest implicated, how do you make --
17 how do you make the homeowner whole?

18 MR. COOK: Your Honor, the legislature knows all about
19 what you just said, and that's their job. To make laws that
20 allow for that to happen. With all due respect, that's not
21 your position to make that law for the legislature. They're
22 the ones who write the mechanic's lien statute. And I'm not
23 sticking up for the South Carolina Legislature.

24 THE COURT: Sure. No, I understand.

25 MR. COOK: But that's -- Your Honor, plus let me say

1 this. The assumption is that the LLC cannot pay these
2 attorney's fees. Nobody knows that.

3 THE COURT: What about if -- what opportunity -- let's
4 assume that I agree with him, the LLC is responsible for the
5 fees. Are there -- and you'll have to refresh my -- this is
6 an honest question. Could you go after the LLC owner
7 individually, some sort of piercing theory, like you would
8 with a corporation? I'm not familiar with that being done
9 and I'm not up on the case law, but --

10 MR. COOK: Your Honor, I think that's probably an open
11 question.

12 MR. KRAWCZYK: That's a loaded question. You ask me
13 anything -- I think anything's possible, Your Honor.

14 THE COURT: I didn't know if there was any law out
15 there is why I was asking.

16 MR. KRAWCZYK: Well, again, and I think -- I just keep
17 going back to the intent of this particular statute, is that
18 you are -- you are licensed by the South -- from the South
19 Carolina LLR. Just like as lawyers we're licensed through
20 the South Carolina Bar. And we have certain obligations and
21 there are certain things that we have to do, and there are
22 certain obligations that contractors have to do that this
23 statute discusses, and it's very specific as to what you can
24 and cannot do. And I think it has the -- again, the purpose
25 of it being, to protect -- generally to protect the

1 contractor, provided the contractor, in and of himself, is
2 acting in a fair manner. If he's not, they say it can be --
3 it can be -- it can be -- the lien can be dismissed.

4 Now, what Mr. Cook is saying, well, the lien is
5 dismissed. Then there's this fee dispute over who has to
6 pay the fees. And I'm looking at it and saying, well, this
7 lien cannot be brought by the LLC. It can be brought in the
8 name of the LLC, but the only person in the LLC who can make
9 the affidavit and who can bring the lien is the licensed
10 contractor. That's why his license number is on the lien.
11 That's why he has a signed affidavit. And it's that
12 affidavit that this court found to be wanton. So it can
13 only act through its -- through its members, again. And I
14 don't -- I guess what Mr. Cook is saying is, well, if I'm a
15 general contractor and I file a lien personally, because I'm
16 not incorporated, then I'm -- you know, I'm going to be
17 subject -- I'm subject to attorney's fees. But because I
18 commit fraud in a corporation's name I shield myself from
19 that.

20 THE COURT: That's the benefit of incorporating.

21 MR. KRAWCZYK: Well, but that's not -- that would come
22 from the LLC statute and not from this statute, Your Honor.
23 And again, that's what was addressed. And I think it's
24 black letter law that when you commit an intention tort, an
25 intentional act, that you cannot hide behind the corporate

1 shield at any time. And this -- this -- again, go back to
2 this is not a situation where they failed to follow the
3 statute. He failed to timely file his lien, or failed to
4 put the lis pendens in, or any of the things associated with
5 the lien. He did all that. But he filed his lien knowing
6 why he was doing that. And Mr. Boheler is sitting right
7 here. And, Your Honor, as I get to talk about the
8 attorney's fees, and when I'm questioned about the
9 attorney's fees, Mr. Boheler can barely make his monthly
10 bills or pay me. Why? Because he's got -- still has over
11 \$70,000 sitting in a bond, which --

12 MR. COOK: Your Honor, I object to that.

13 MR. KRAWCZYK: -- which again --

14 MR. COOK: That's irrelevant, and it's -- it's --

15 MR. KRAWCZYK: Well, it's not irrelevant --

16 MR. COOK: -- in plain view. Whether it does or
17 doesn't, I don't know.

18 THE COURT: Well, it won't. But, I mean, he's making
19 the point that -- he's making the point that I sort of made.
20 He's not being made whole because he's incurred these
21 expenses and that's not fair to him. And your point is also
22 well taken that the Supreme -- that the legislature could
23 have easily specified that individual liability attached to
24 whoever it is puts their name on the lien. You've both made
25 very good points that I will have to consider further.

1 Now, on the issue of the actual fees themself. You
2 wanted to address that. It's the size of the fee, I'm
3 assuming? The value?

4 MR. COOK: Some items, Your Honor. Okay?

5 THE COURT: Okay. Sure. Go right ahead.

6 MR. COOK: I'm going to address it this way to start
7 off, and then I'd like to have the opportunity to cross-
8 examine counsel on his affidavit.

9 THE COURT: All right.

10 MR. COOK: To me the issue is this. Is \$34,091.80
11 fees, and \$3,448.37 in cost reasonable in connection with a
12 residential mechanic's lien action that involved only two
13 depositions and was resolved by way of summary judgment.
14 That's the opening statement, Your Honor. Now, if I could -
15 - if I could have Mr. Krawczyk take the stand, Your Honor.

16 THE COURT: All right. I guess come on up.

17 MR. KRAWCZYK: No problem. Where do you want me?

18 THE COURT: I'll put you under oath up here. We're
19 doing a non-jury.

20 CHARLES A. KRAWCZYK, having been
21 first duly worn, testified as follows:

22 MR. COOK: Your Honor, would it be easier for you if I
23 came around?

24 THE COURT: However you want to do it.

25 CROSS-EXAMINATION

1 BY MR. COOK:

2 Q Mr. Krawczyk, do you have in front of you a copy of the
3 affidavit you submitted in connection with this?

4 A I do.

5 Q All right. And that affidavit is a four page affidavit
6 that was notarized on April 23rd; is that correct?

7 A That's correct.

8 Q All right. And I'm assuming, as you were holding Mr.
9 Terlizzi to the standard when he submitted his affidavit,
10 that it certainly was your intention that everything be
11 correct, true and accurate. Is that --

12 A That's correct.

13 Q -- a fair assumption?

14 A Yes.

15 Q And attached to your affidavit is -- it appears to be
16 nine pages of billing information. Is that also correct?

17 A That's correct.

18 Q And my understanding is that this purports to be all of
19 the time entered, some of which was billed, some of which
20 wasn't billed, and the cost associated with your
21 representation of the Bohelers; is that correct?

22 A That's my understanding, yes.

23 Q All right. And the total amount of the bill is larger
24 than what you're claiming for attorney's fees because you've
25 tried to deduct out things that weren't related to the

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1 mechanic's lien.

2 A I tried to pull those things and give credence to just
3 those issue that I believed were associated with the --
4 well, some of the items are associated -- some of the line
5 items are associated solely with the lien, and some are
6 associated with the lien plus other causes of action that
7 are involved in here. And so, I went through them and have
8 gone through and assigned specific values to that.

9 Q Did you prepare something where you could go by and say
10 on this date this thing was done in this amount of time and
11 it didn't relate to the mechanic's lien?

12 A Yeah, there were several things that didn't relate to
13 the mechanic's lien.

14 Q I understand that. But did you prepare a separate
15 document to show what items you pulled out and --

16 A No, I did not. I checked those that -- that I thought
17 were not related and I removed those. And those that were
18 solely related I just added those up. And those that were
19 partially related I looked at and gave percentages to.

20 Q Is it accurate to say that by looking on the billing
21 information you provided, no on other than you would know
22 what you pulled out?

23 A That's why I provided an affidavit, yes.

24 Q Is that -- you agree with me that there's no way you
25 could tell which items you weren't including just by looking

1 at the affidavit and the billing statements?

2 A That's correct.

3 Q All right. Now, if I can get you to look at the first
4 few time entries that appear to be on page one of the
5 billing statement. You have time entries -- I assume CAK is
6 you; is that correct?

7 A That's correct.

8 Q All right. You have time issues from July 13, 2011
9 down through August 31st, 2011. Do you see those?

10 A Yes, I see those.

11 Q All right. The mechanic's lien was not filed until
12 September the 6th. Would you agree with me that that work
13 could not possibly have been done in defense of the lien
14 since the lien didn't exist at that time?

15 A Yes, that's correct.

16 Q All right. I calculated that that was \$660 in fees.

17 A Okay.

18 Q Can you tell me whether that was part of what you
19 pulled out or not?

20 A What I pulled out is I looked at the date of the lien
21 and I then -- from what -- from the date of the lien until
22 the day the foreclosure action was filed, all those were
23 included. And then from there on out I had to differentiate
24 based upon time entries.

25 Q Now, I'm sure you remember that we came to court in

1 Newberry about two years ago because after the lien was
2 filed, but before the suit was filed, you presented a motion
3 to the court to have the lien dismissed basically for the
4 same reasons of what you later filed the summary judgment
5 motion on.

6 A That's correct.

7 Q And you lost that motion, did you not?

8 A I did.

9 Q And if I could have you look at your time entries from
10 September 26th, 2011 through November 10, 2011, those are
11 the ones that I saw that seem to relate to your pre-suit
12 motion to dismiss. Does that look about right?

13 A That's what's here, yes.

14 Q Did you pull those items out of what you're seeking the
15 court to award?

16 A No.

17 Q All right. Even though you did not prevail on the
18 motion, you're seeking to have the court award you
19 attorney's fees?

20 A Absolutely.

21 Q Okay. Thank you for clarifying that. Now, if you will
22 move forward in the billing to March 27th, 2013. And I'm
23 looking basically from that point on to about May 31st,
24 2013. That appears to be work done by you and other people
25 at your firm in connection with defending my motion for

1 summary judgment on the counterclaim. Does that -- would
2 you agree with that in general terms?

3 A Yes. Some of them are, some of them aren't.

4 Q It looked to me that if you added all that up it was
5 over \$4,000 in attorney's fees related to that. Was that
6 part of what you pulled out?

7 A There may have been part of those that were related to
8 this.

9 Q Well, given that it was my motion for summary judgment
10 on your counterclaim, what would have been the justification
11 for not excluding the total amount?

12 A Well, there was very little. But the importance was
13 that there were several things that you brought, for
14 example, your motion, that Mr. Terlizzi was not a proper
15 party. A Rule 11 motion -- a Rule 14 motion that he could
16 not be a third party to this action. So not all of it was
17 just for counterclaims. And so, as part of that, it was
18 important to our defense of the mechanic's lien at that
19 issue, as we are sitting here today, to make sure that Mr.
20 Terlizzi was still a party to this action. And if I had to
21 go -- and I did at the time I did the affidavit. I went
22 through, there were some other arguments, including the LLC
23 argument, that which we are discussing here today as a
24 result of the mechanic's lien -- dismissal of the mechanic's
25 lien that were also a part of that hearing. And I looked at

1 that and there was a good portion of it which had to do
2 with, of course, defending some of our actions. But it also
3 related to the mechanic's lien issue in that your client was
4 trying to escape personal liability for that. And I believe
5 it was for every cause of action, some of which were related
6 to the mechanic's lien.

7 Q Well, how much of that time do you think was related
8 strictly to the mechanic's lien?

9 A It's interesting as you try to break these out, you
10 have to look at the importance of the mechanic's lien action
11 as opposed to the contract action in this case. Had Mr.
12 Terlizzi just filed a breach of contract action, there would
13 have been very little work done in this case, because I had
14 his partner come to us pre-suit and swear an affidavit that
15 all the things that Mr. Terlizzi said were incorrect, and
16 that he had agreed to all the contractual terms that Mr.
17 Terlizzi was now saying were not. So the most important
18 part of this case was defense of the mechanic's lien. To
19 the Bohelers it was \$143,000 in the suit -- excuse me, in
20 the court, which was strangling them at the time. So as you
21 look at the importance and the amount of effort that took
22 place to do even the defense of your action, probably 50 to
23 60 percent of that was due to trying to keep your client
24 personally -- personally involved in this case. And the
25 rest of it, quite honestly, was very simple black letter

1 law. And again, we come down -- we're talking about the
2 contract cause of action. There would have been very little
3 work done on this case, but for the fact that my clients
4 were in such dire need it was -- and were being -- having
5 issue of perhaps losing their home. And so, when I looked
6 at this and I had something that was both mechanic's lien
7 related, and other cause of action related, depending on
8 what it was -- this one was a little less. It was probably
9 more like 50 percent. But it got higher.

10 Q Would it -- is it accurate to say that in your
11 determination of what was and wasn't related it's a little
12 bit of guesswork involved in this?

13 A It's not guesswork.

14 Q But you don't -- but you don't --

15 A I've sworn an affidavit that this is what I believe to
16 be related to the mechanic's lien.

17 Q And I think you indicated that you had reviewed
18 everything before you did the affidavit; is that correct?

19 A I reviewed a lot. A lot --

20 Q I don't mean your file, but I mean the billing. What
21 you submit to the court as to what you're entitled to, you
22 reviewed that, didn't you?

23 A That's correct, yes.

24 Q Would you look at the time entries for March 12th of
25 this year, 2014? The first -- are you there?

1 A Yes.

2 MR. COOK: Your Honor, are you there?

3 THE COURT: Uh-huh.

4 Q The first entry for 3/12/14 has the initials CVH. Who
5 is that?

6 A That's Carl Hiller.

7 Q And what position does Carl hold?

8 A He's an associate in my office.

9 Q He's an attorney?

10 A Yes.

11 Q Okay. Carl states that he worked two and a half hours,
12 conference with you, prepare for a deposition and attend
13 deposition. There wasn't a deposition that day, was there?

14 A On 3/12?

15 Q Right. That's the date of the motion hearing, wasn't
16 it?

17 A Well, that is correct.

18 Q All right. And look below that. Then he says he
19 worked three hours attending the summary judgment hearing,
20 but that was estimate. Do you see that?

21 A Yeah.

22 Q And then you got time for you. You've got three hours
23 attend summary judgment hearing estimate. Then you put down
24 three more hours, attending hearing -- attend summary
25 judgment hearing, and then you have one more entry for 5.1

1 hours, prepare for and attend motion for summary judgment on
2 mechanic's lien.

3 A I did see those --

4 Q Those -- that's not correct, is it?

5 A Well, I did see those and those were all removed. And
6 actually a good portion of what I had -- some of what I had
7 Carl doing, which was duplicative, were also removed.

8 Q There is -- but there is no way to know what you
9 removed or what you didn't remove based upon what you've
10 submitted to the court, is there?

11 A I've submitted an affidavit that I believe was fair and
12 accurate, and you subpoenaed these documents from me and I
13 gave them to you.

14 Q Well, let me ask you this though. You submitted, as an
15 attachment to your affidavit, statements that -- well, let
16 me ask you this. Are those entries for 3/12 correct?

17 A Well, two of them were obviously estimates. Those were
18 both removed, as I recall. And I believe Carl's -- the two
19 that were estimates were definitely removed. I remember
20 those. And attend summary judgment hearing. Yeah. I mean,
21 I was -- I can't recall whether I removed that one or not.
22 But that could be corrected.

23 Q But there's not -- what you didn't submit was a clean
24 sheet showing just what you're claiming as attorney's fees.
25 What was submitted to the court has a lot of other stuff on

1 there.

2 A What was submitted -- what was actually submitted to
3 the court was an affidavit that I swore after going through
4 here and, to the best of my belief, was accurate and fair.
5 And, in fact, in many instances I didn't charge the Bohelers
6 things which your client is probably getting the benefit of.
7 Unfortunately, I guess that's something that I'll learn for
8 later I won't do.

9 Q Now, it looks as though you've charged \$825 total for
10 preparing the order and the attorney's fee affidavit.
11 Because in your affidavit you said there was three hours of
12 time connected with that. Does that sound -- is that
13 ringing a bell?

14 A If it was in there, it was in there.

15 Q All right. The order cites a case that is not good
16 law. The billing stuff that you submitted as errors in it.
17 Do you think you're entitled to that three hours of time?

18 A No, I don't. I'll even submit that I'll remove that
19 for the court, \$325. If I thought -- if you subpoenaed the
20 document I would share -- I guess I should have brought it
21 with me and I would have been able to tell you exactly.

22 Q Now, your affidavit in paragraph 10 indicates that you
23 did a lot of things related to the Bohelers' loan and things
24 of that nature that you think were related to the mechanic's
25 lien, but weren't directly legal work related to the

1 mechanic's lien. How would you characterize it?

2 A I characterize it as things that were necessary to
3 protect the Bohelers from the mechanic's lien.

4 Q But they weren't things like taking depositions or
5 filing answers or things like that, were they?

6 A No. They were helping bond off the lien that was on
7 the house.

8 Q And you're seeking to have the court award you fees for
9 all the work spent for those non-legal matters?

10 A Those are legal matters. Absolutely legal matters.

11 Q Well, discussions with the bank aren't a legal matter,
12 are they?

13 A Absolutely they're legal.

14 Q That's your position?

15 A Absolutely. If some -- if you file a lis pendens and
16 the bank says we're not giving you any more money because
17 you sued the bank and you filed a lis pendens, and I have to
18 call the bank and tell them what's going on and give them a
19 legal opinion, the fact that your client has committed
20 fraud, but we have to fight this in court and that the
21 Bohelers are in the process of bonding that off, yes, that's
22 all part of this. Absolutely.

23 Q I'm going to ask you about your time entries from
24 February 29th of 2012, leap year, to March 19th, 2012. If I
25 added it up correctly, it looks like you had 8.1 hours

1 involved in drafting the answer and counterclaim. And your
2 clerk, or associate, had another four hours in drafting that
3 document, for a total of 12.1 hours in drafting that
4 document.

5 A Yes.

6 Q Do you think that's a reasonable amount of time to
7 spend on an answer and counterclaim?

8 A Well, that's what it took to come up with all the
9 particular counterclaims. And I believe it's about a 20
10 page answer, with various causes of action regarding fraud
11 and, of course unfair trade practices, and license lending.
12 And there was a lot of very interesting and new issues
13 associated with that. It took a lot of research and a lot
14 of time to do. So absolutely, yes.

15 Q Several of the initials that I see for time entries
16 have MMR. Who is that?

17 A Yes. That's Margaret Roth.

18 Q Who is that?

19 A She's my paralegal.

20 Q Your paralegal. Okay. And also LFA. Who is that?

21 A That would be Leigh Alberts. She's my paralegal.

22 Q On February 23rd of 2012 there's \$162.50 charge for
23 review file and update pleadings and correspondence. And
24 you've got that throughout. March 26, '12, March 7, '13,
25 October 7, '13, October 29, '13, November 7, '13, and March

1 5, '14. And it actually totals up to over \$500 in charges
2 just for updating the file and reviewing the pleading -- I
3 mean, updating the pleadings. I know what that is. But is
4 that work that you believe legitimately should be shifted
5 under the attorney's fee statute?

6 A Yes.

7 Q On March 9th -- I'm sorry. I apologize. On August 9 -
8 -

9 A And just to be clear. Whether it's an attorney's fee
10 statute or not, my client pays for it.

11 Q I understand that. But you would agree that between
12 you and your client is contractual, correct?

13 A Correct.

14 Q But what the judge has to award is what's reasonable
15 for the statute. And those aren't always the same thing,
16 are they?

17 A Whatever the judge thinks it is.

18 Q Okay. Well, theoretically then it would not always be
19 the same thing, would it?

20 A It's completely at the judge's discretion.

21 Q All right. On August the 9th of 2012 and August the
22 21st, 2012 you have a total of 3.7 hours that are identified
23 as review spreadsheet from client, which comes to \$1,017.50
24 --

25 A Yes.

1 Q -- in attorney's fees. What took so long to review the
2 spreadsheet?

3 A A huge amount of information that was involved in that.
4 And essentially what was in his spreadsheet, there was
5 probably about 10 different sheets ranging from the monies
6 he paid to -- he actually took a lot of the receipts that
7 your client had given, broke them down by what they were,
8 how they were expended, where they were done, when they
9 there done. It was a complete timeline. And you have those
10 spreadsheets of what they were. They had to be organized as
11 to what they were, analyzed as to whether or not -- and all
12 for the purposes of trying to find out exactly how much
13 money in material and labor your client actually had in this
14 job. And as it turns out, he didn't have nearly as much as
15 he thought he did.

16 Q Now, in addition to the fees, you've also billed
17 certain costs. I mean, I think you're asking for other
18 \$3,000 in cost associated with this.

19 A Yes.

20 Q In reviewing the cost, I'm seeing charges for computer
21 research on January 31st of 2012, March 30th of 2012, May
22 31st, 2014, September 30th, 2013, and February 28th of this
23 year. And if my math is correct, it comes to \$1,000 --
24 \$1,076.09 for computerized legal research.

25 A Yes.

1 Q Are you familiar with the South Carolina Bar's case
2 maker program which is free?

3 A I know of it, yes.

4 Q I don't recollect that you ever cited any out of
5 jurisdiction cases or statutes or anything like that. Is my
6 memory faulty or is that true?

7 A There might have been one or two. But nothing
8 extensive.

9 Q What was so complicated about the legal issues -- okay,
10 the legal issues that necessitate --

11 A Well --

12 Q Let me finish the question, and I'll certainly give you
13 a chance to answer. That necessitated over \$1,000 in legal
14 research when there are free programs available to do the
15 same thing?

16 A Well, the South Carolina Bar Casemaker program
17 certainly is nice and handy but it's flawed. For example,
18 today if you were to look up *16 Jade Street* under 2012 it
19 doesn't tell you that that case has been removed and
20 replaced.

21 Q Well, I think it does. That's what I used to find the
22 case.

23 A But Westlaw will tell you. And basically when we're
24 doing our legal research we use Westlaw, which is standard
25 in the industry that's used. Westlaw bills us for our time.

1 That time and that cost is passed directly on to the client.
2 It is not -- we don't make any profit off of it. It's just
3 based upon the amount of time that we're on Westlaw that we
4 -- and that doesn't necessitate that it has to be done in
5 Casemaker. And there's lots of things that Casemaker
6 doesn't do that Westlaw does do very well, and is very --
7 very much important and efficient. So in many instances
8 your client will probably save time by the fact that we used
9 Westlaw as opposed to Casemaker just by the results of that,
10 and the different things that we get with Westlaw that we
11 don't get with Casemaker.

12 Q Your employment agreement with the Bohelers indicates
13 your hourly rate is 275; is that correct?

14 A That's correct.

15 Q And that's been what you've charged throughout the
16 litigation?

17 A That's correct.

18 Q And it also indicates that you're charging \$125 for
19 paralegal work per hour, and also law clerk per hour?

20 A Yes.

21 Q And I see well over \$1,000 in paralegal work by this
22 MMR and ALF. Was the fellow that you mentioned, CDH, Mr.
23 Hiller -

24 A Yes.

25 Q -- was he a law clerk with you at one time?

1 A He was.

2 Q Was he a law clerk during the period of time that this
3 litigation was going on?

4 A Yes.

5 Q There's a lot of entries for him at 125.

6 A Right.

7 Q Would it be fair to say that that was law clerk work?

8 A That's correct. Depending on the time period and when
9 he became an actual attorney and then subject to higher
10 rates.

11 Q That's what I mean. If it's billed at 125 that would
12 indicate --

13 A He's a law clerk.

14 Q -- he's a law clerk, correct?

15 A Yes.

16 Q I calculated that he's got 40 hours -- 40.2 hours in
17 this file at \$125, which is \$5,025 for work billed by a law
18 clerk. Does that sound about right to you?

19 A Whatever it says in the documents, that's correct.

20 Q You would stick by whatever it shows on the billing
21 records?

22 A That's my billing records.

23 MR. COOK: Your Honor, that's the questions that I
24 have. I would submit a couple of things if, Your Honor, is
25 ready for me to do that.

1 THE COURT: Sure. Did you want to tell me anything in
2 your defense to --

3 MR. KRAWCZYK: If you have any -- if you have any
4 questions, Your Honor. I mean, my affidavit -- I'll
5 basically say this, Your Honor, and how I went through this,
6 if you'd like to know, is I went through and, like I said, I
7 itemized those dates that were specific to the lien to begin
8 with, and those were automatically placed in. There are
9 some things in here -- for example, there was a burst pipe
10 in the house and we had to come up with an understanding of
11 how Mr. Terlizzi's insurance would pay for that burst pipe,
12 and we came -- we came up with a consent, and I removed --
13 all that had to do with the burst pipe. It didn't have
14 anything to do with the lien. I removed anything that I saw
15 that I believed to be related to something other than -- and
16 there were various numbers of those. Including in the cost.
17 And I detailed each of the cost. I went through and I said,
18 okay, that's not associated with the lien. Those things
19 that were associated with the lien, or both, for example,
20 the deposition, again, I had to -- as an attorney, I've been
21 a construction attorney for more than 20 years. And I
22 understand a construction case. I understand a breach of
23 contract case. And I also understand that when I have one
24 of the partners saying, you know, this isn't right and this
25 isn't right, I can try that case with what I've got. I

1 don't need depositions. I don't -- you know, a lot of the
2 stuff that I ended up having to have in this case. I don't
3 know that I would have taken the deposition of Mr. Terlizzi
4 if we had just a breach of contract case. I haven't taken
5 any other depositions other than his, even though there are
6 various people involved in this. I feel like I have enough
7 of that. But the issue before me from the very day they
8 filed this lien was how -- for my client, was how am I,
9 number one, going to save my house, and how, number two, am
10 I going to be able to come up with \$143,000, and number
11 three, how do I get my money back. Okay? And, I mean, Mr.
12 Boheler is here in the courtroom. And that has been the key
13 focus of this case from day one. So as I went through
14 specific ones like filing an answer, I broke it down based
15 upon the amount of time that I believed was associated
16 mostly with the lien action. There are causes of action
17 that, quite frankly, got dismissed by Judge McMahon that
18 were sort of probably maybe thrown in there, but there
19 wasn't a lot of time and effort taken to do that. I tried
20 to be as careful as I could. And, in fact, in many cases I
21 believe I was conservative in how -- because I understand.
22 The case law here says I'm not entitled to every single bit
23 of attorney's fees associated when there's other causes of
24 actions and other things going on. So I try to do -- again,
25 with my knowledge and my understanding of this case, and

1 what I did on this case, and what my associates did and what
2 my paralegals did, was break it down to what I believe to be
3 a fair and accurate attorney's fees award based upon what --
4 based upon these amounts. So -- and so, it was not done
5 haphazardly. It was done in a manner that I believe to be
6 correct.

7 Now, whether or not Mr. Cook has pointed out an entry
8 that may or may not have been included in it, I can't say as
9 I sit here today. I don't have that. But I can say that I
10 did go through this process and do the best I could. I
11 think due to the fact that we have been litigating -- it's
12 been almost three years since the mechanic's lien has been
13 filed. And in three years I don't think, with my law firm,
14 that \$36,000 is a lot of money for litigation. I've got a
15 lot of other cases that are a lot less than three years and
16 -- so in many respects, I think it's more than fair.

17 And again, all I will say to the court is, you know, as
18 an officer of the court, I did my best to comb through and
19 come up with what I believe to be a fair and accurate
20 rendition of the attorney's fees.

21 THE COURT: You want to point out some stuff to me?

22 THE COURT: Yes, sir. One is, charging \$125 an hour
23 for the law clerk work is manifestly unreasonable, Your
24 Honor. I was a law clerk. I suspect we've all been law
25 clerks. We're not worth anywhere near that amount of money

1 when we are -- now, this is a judicial clerk --

2 THE COURT: Present company excluded.

3 MR. COOK: -- who is an officer of the court. I'm not
4 including him in this, Your Honor. We're talking about
5 unlicensed people. I would even state I think that's too
6 much for paralegal work, with all due respect to paralegals.

7 And, Your Honor, the Defendants bear the burden of
8 proving attorney's fees if they want it. If you -- as I
9 understand what Mr. Krawczyk has indicted is that he's
10 taking out things -- you got to -- you've got all the time,
11 and he's sort of unilaterally taken out some things and is
12 asking for less, but has not identified what was taken out
13 or how that was reached or anything like that. And I just
14 think it's -- it's based on -- I don't question that work
15 was done or that Charley is a good attorney or those kind of
16 things. That's not what I'm getting at. What I'm getting
17 at is you've got to come up with a precise figure based upon
18 some reasonable method, and I don't think you have that
19 here.

20 THE COURT: All right. Good enough, gentlemen. I have
21 not signed the order on this yet because I wanted to wait
22 until we had this hearing, so...

23 MR. KRAWCZYK: And I appreciate your indulgence for
24 that, Your Honor.

25 THE COURT: Certainly, not a problem. I'd rather do it

1 all at one time, and then we can address -- maybe we can
2 address -- after I do issue an order, perhaps we can address
3 the reconsideration or whatever on briefs. But we'll cross
4 that bridge when we come to it. I'll take a look at this
5 and get something finalized in the coming days.

6 MR. KRAWCZYK: If Your Honor needs anything,
7 clarification, let me know. I do have one other issue I'd
8 like to raise before the court.

9 THE COURT: Sure.

10 MR. KRAWCZYK: Only to save the court's time, hopefully
11 another hearing, just throw it out there, that in the event
12 that the court issues an attorney's fee award in this that
13 the court recognizes that is a money judgment award, which
14 my client would intend to enforce immediately. And in the
15 event that Mr. Terlizzi decides that he wants to appeal,
16 either Terlizzi or THI appeal, that I would request that he
17 be -- my client be entitled to a bond for that appeal.

18 THE COURT: Did they change the -- did they recently
19 change the rule on that where the circuit court decides
20 that, or is it --

21 MR. KRAWCZYK: Yes, Your Honor. That's --

22 THE COURT: -- have they changed that?

23 MR. KRAWCZYK: I've got the statute if you want it.

24 THE COURT: I can't remember.

25 MR. KRAWCZYK: It's basically the trial court's -- if

1 they seek to have a stay of a money judgment and -- it's
2 your discretion as to whether or not an appeal bond is
3 placed. Otherwise, in a normal situation, you can't appeal
4 a money judgment. You can't stay a --

5 THE COURT: Right.

6 MR. KRAWCZYK: -- the enforcement of a money judgment
7 on appeal.

8 THE COURT: On appeal. Absent a --

9 MR. KRAWCZYK: Absent of a bond. And that's -- that
10 would be my request on this, Your Honor.

11 THE COURT: Well, based upon my prior ruling, I will
12 tell you that there will be an award of attorney's fees. I
13 want to go through your affidavit again, in light of what's
14 been presented here. Obviously if there are any additional
15 questions I'll contact each of you by email and maybe they
16 can be answered or resolved that way.

17 The question is going to be whether the judgment is
18 against an LLC or whether it's going to be against Mr. --
19 whether it's going to be against the Plaintiff individually.
20 And I haven't made up my mind on that. I think both of you
21 have made excellent points on that particular argument. And
22 as we all have agreed, there's no current law in South
23 Carolina on that point. So I'll think about it.

24 MR. COOK: Thank you for your time.

25 MR. KRAWCZYK: Fair enough, Your Honor.

1 THE COURT: Thank you all. Appreciate it, gentlemen.

2 (Whereupon, the proceeding was concluded.)

3 - - - END OF TRANSCRIPT OF RECORD - - -

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STATE OF SOUTH CAROLINA
COUNTY OF NEWBERRY

IN THE COURT OF COMMON PLEAS

TERLIZZI HOME IMPROVEMENT)
LLC,)

2012-CP-36-00090

PLAINTIFF,)

-VS-)

MICHAEL L. BOHELER, ET AL,)

DEFENDANT.)

TRANSCRIPT OF RECORD

OCTOBER 16, 2014
NEWBERRY, SOUTH CAROLINA

B E F O R E:

THE HONORABLE FRANK R. ADDY, Jr., JUDGE

A P P E A R A N C E S:

ATTORNEY FOR PLAINTIFF:

ROBERT M. COOK, II, ESQUIRE

ATTORNEY FOR DEFENDANT:

CHARLES A. KRAWCZYK, ESQUIRE

TARA T. SCOTT, CVR
CIRCUIT COURT REPORTER

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EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>
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(NO EXHIBITS INTRODUCED DURING THIS HEARING)

1 THE COURT: I think we're back on the record on
2 Terlizzi Home Improvement vs. Boheler, or Boheler. I don't
3 have the case number on this. We are here on the
4 Plaintiff's motion to reconsider. I think when we left off
5 on the last exchange that I had with the attorneys the
6 Defendant had also forwarded to me a order releasing the
7 money that's being held at the clerk of court's office on
8 behalf of the Defendants. And I think that I did inform
9 everyone I was holding off on sending that in up until such
10 time as we had a chance to have a hearing on this case, or
11 on this motion for reconsideration. The court did in July,
12 I believe, grant summary judgment to the Defendant, or
13 Defendants. The lien was dismissed and attorneys fees were
14 granted. I am familiar with the order that I issued. I
15 believe I have one on the computer. But that's where I
16 think we left off. So at this point in time I'm happy to
17 hear the motion for reconsideration on the Plaintiff's -- or
18 at request of the Plaintiff.

19 MR. COOK: May it please the court, Your Honor.

20 THE COURT: Yes, sir. I'm Robert Cook here for the
21 Plaintiff, Terlizzi Home Improvement, LLC and the third
22 party Defendant, William Terlizzi. Your Honor, just so you
23 know, the case number is 2012-CP-36-0090.

24 THE COURT: Thank you, sir.

25 MR. COOK: Your Honor, I appreciate the opportunity to

1 be allowed to make an oral argument to you with regard to
2 this motion. I had indicated to you that my -- my prior
3 experience as an attorney has been that these are routinely
4 denied without any hearing whatsoever, so thank you.

5 THE COURT: Well, I'm happy to afford that to you. The
6 motion hearing -- the request form actually had the motion
7 hearing was requested, so I typically --

8 MR. COOK: Yes, sir.

9 THE COURT: If somebody wants a hearing, I'm going to
10 give them a hearing.

11 MR. COOK: And in all candor, I suspect that all my
12 motion hearings form say the very same thing all the time.

13 THE COURT: Okay.

14 MR. COOK: Also, I appreciate the court stating in
15 connection with the previous case that on non-jury matters
16 it's typically reluctant to grant summary judgment, because
17 that gives me a -- this was --

18 THE COURT: It does give you a nice segue into your
19 argument.

20 MR. COOK: Yes, sir. Yes, sir. And this initially
21 had been done as a jury trial case, but then we entered into
22 a consent order transferring it to the non-jury roster. So
23 actually at the time that you heard the summary judgment
24 motion we had already agreed to have it heard on the non-
25 jury roster.

1 Your Honor, this is the case in which the attorney's
2 fees that were assessed in connection with a dismissal of
3 the mechanic's lien were not just assessed against the party
4 which brought the lien, which was the Plaintiff, Terlizzi
5 Home Improvement, LLC, but also assessed individually
6 against the owner of the LLC, William Terlizzi, who was a
7 third party Defendant on other causes of action. I'm going
8 to ask the court to reconsider initially that part of its
9 order for these reasons.

10 The mechanic's lien law found in Title 29 of the Code
11 makes absolutely no provision for the court to do what it
12 did, which is to assess attorney's fees against a non-party
13 to that action. The law, as it has been interpreted -- and
14 I'm not aware of any cases interpreting this particular
15 factual scenario. During the course of this litigation
16 counsel for the Defendants has not brought forth any, and I
17 have not found any and the court has not cited any. If it's
18 out there, it's apparently elusive. Nevertheless, what is
19 clear is that the mechanic's lien statute must be strictly
20 construed. Your Honor, there are any number of cases that
21 state that. I'll refer to a recent case from our Supreme
22 Court, the *Ferguson Fire and Fabrication vs. Preferred Fire*
23 *Protection*, which is a July decision this year from the
24 Supreme Court. I don't have a cite yet. But it states the
25 obviously, which is a mechanic's lien -- mechanic's liens,

1 and actions arising from mechanic's liens, are breaches of
2 statute, and as such those statutes are to be strictly
3 construed. There's simply no provision within the Code for
4 what the court did, which was to assess Mr. Terlizzi as
5 being individually liable for these attorney's fees.

6 Along those same lines, this appears to be a novel
7 issue of law insofar as reported cases in South Carolina are
8 concerned, and it is also generally thought to be a
9 principal of jurisprudence in this state that novel issues
10 of law are not typically the type things that are best
11 resolved by means of a summary judgment order. And I would
12 cite to the court the case of *Schmidt vs. Courtney* which is
13 found at 357 S.C. 310. That's a 2004 Court of Appeals case,
14 which simply states that proposition of law which I suspect
15 the court is already well familiar with.

16 One of the interesting things about, or at least
17 granted by the court, is it was never requested by the
18 Defendants, Your Honor. This action started by the -- filed
19 by the Plaintiff, which is the LLC. Mr. Terlizzi was not a
20 party to that action. The Defendants then filed an answer
21 in which they asserted numerous counterclaims against the
22 LLC, and also several what they purported to style as third
23 party claims against Mr. Terlizzi individually. Those
24 include breach of contract against the LLC, fraud against
25 both the LLC and Mr. Terlizzi, breach of contract with

1 fraudulent action against both the LLC and Mr. Terlizzi,
2 misrepresentation against the LLC, intentional inflictions of
3 emotional stress against Mr. Terlizzi, intentional
4 interference with contractual relations against the LLC, an
5 Unfair Trade Practices Act claim against the LLC, negligence
6 against both the LLC and Mr. Terlizzi, conversion against
7 both the LLC and Mr. Terlizzi, and abuse of process against
8 both the LLC and Mr. Terlizzi. Within either their answer,
9 they counterclaims, or their third party claim there was no
10 allegation of any ultra vires conduct on the part of Mr.
11 Terlizzi. There was no request or pleading that the LLC
12 shield be pierced as to Mr. Terlizzi. There was no
13 allegation that Mr. Terlizzi was acting as the alter ego of
14 the LLC. There was no motion to add Mr. Terlizzi to the
15 mechanic's lien action. So the pleadings don't provide any
16 foundation for asserting -- for an assertion of attorney's
17 fees against Mr. Terlizzi, even if they were allowed by law,
18 which they are not.

19 The motion of the Defendants for a summary judgment
20 does not request attorney's fees against Mr. Terlizzi. In
21 fact, the -- if you'll give me just a minute, Your Honor.

22 THE COURT: Certainly.

23 MR. COOK: The memorandum of law which was submitted to
24 the court by the Defendants, and this is on the last page,
25 says "Requiring the Plaintiff to --" this is what the

1 request -- "Requiring the Plaintiff to reimburse the
2 Defendant Third-Party Plaintiff for all of their attorney's
3 fees and costs arising in defense of the lien pursuant to
4 29-5-10." Your Honor, with all due respect, that issue was
5 not before you, and it was not right for adjudication. In
6 addition, it would just be no basis in law for you to have
7 done what you did.

8 That is why we ask that the court, at a minimum,
9 reconsider that part of its order.

10 THE COURT: All right. Let's -- I know that you filed,
11 I think, seeking reconsideration of it all.

12 MR. COOK: Yes, sir.

13 THE COURT: Can we address that, first?

14 MR. KRAWCZYK: Absolutely, Your Honor.

15 THE COURT: Go ahead, if you don't mind. Would you
16 mind responding to that.

17 MR. KRAWCZYK: First of all, I agree with the court 100
18 percent in its order. So as I sit here today --

19 THE COURT: I imagine you do.

20 MR. KRAWCZYK: Well, as I sit here today I think the
21 court absolutely saw all the issues, looked at all the
22 factual allegations and all the evidence before it and made
23 the correct ruling. So, Your Honor, to the extent that I'm
24 here today, I'm here to address whatever concerns you may
25 have that are raised.

1 The court has made this decision. And, you know, if
2 the court has issues or problems now in reconsidering its --
3 I'll certainly address those. And I don't know how in depth
4 you want me to get into my arguments, Your Honor. One of
5 the things I learned a long time ago as a lawyer is don't
6 argue with the court when he's already ruled in your favor.
7 So --

8 THE COURT: Here are my concerns then. The assertion
9 that I afforded relief that was never requested by the
10 Bohellers that any ultra vires type argument was not pled.
11 Essentially that I overstepped my authority in awarding
12 attorney's fees against individually the share -- the sole
13 shareholder of the LLC. And I know that in July we went
14 down the road of that case that came out and then two years
15 later they issued a different case. And I am trying to
16 think of the name that of that thing.

17 MR. KRAWCZYK: *Jade Street*, Your Honor.

18 THE COURT: That's it, *Jade Street*, because it came
19 under a lot of attack. But I think *Jade Street* dealt with
20 imposing liability against an owner of the -- *Jade Street*
21 won, imposing liability against the LLC owner where only
22 negligence was alleged. In this case I found that there was
23 more than negligence involved. But I'm concerned with the
24 procedural posture in that he's telling me that the
25 Defendants never requested what I -- requested for me to do

1 what I did, and that is impose individual liability on the
2 shareholder. Can you speak to that?

3 MR. KRAWCZYK: Absolutely. First of all, in my
4 memorandum I had a whole section on this very specific issue
5 where I addressed it. I addressed *Jade Street* specifically
6 at that time, which had not been overturned -- or had just
7 been overturned. What Mr. Cook is referring to is just the
8 recitation at the end of the memorandum which says Plaintiff
9 rather than Plaintiff and Third Party Defendant. But
10 clearly within the memorandum we sought the exact relief
11 sought. And in subsequent memorandums to this court we also
12 -- when it came down to the attorney's fee hearing that we
13 had, we also had within that memorandum. We sought that
14 same -- that same relief in there. And again, we addressed
15 this issue in oral argument many times. So if Mr. Cook now
16 is saying that this isn't something that was before the
17 court, he addressed it -- specifically brought up the fact
18 that *Jade Street* had been overturned without our hearing.
19 So for him now to bring up the fact that it wasn't before
20 the court is a little, I think, mincing words and picking
21 and choosing out of the memorandum what he wants.

22 His other statement is that I haven't made Mr. Terlizzi
23 an action to the mechanic's lien statute. I can't make
24 anyone a party to the mechanic's lien statute. The
25 mechanic's lien statute action -- the mechanic's lien

1 statute, in order to take advantage of the mechanic's lien
2 statute, by definition, you have to be a licensed contractor
3 in South Carolina. A licensed contractor is the only one
4 who can file that mechanic's lien and the only one who can
5 take advantage of the relief that's sought. The only way
6 that THI could possibly act under the mechanic's lien
7 statute is through Mr. Terlizzi who was the licensed
8 contractor on the job. Mr. Terlizzi is the one who
9 intentionally, grossly, negligently, all the things that
10 you've put in within your order, created this problem in his
11 own taking advantage of the -- his position as a licensed
12 contractor in South Carolina.

13 I think you addressed it pretty clearly, Your Honor, in
14 the order that if you look at *Jade Street*, the Supreme Court
15 clearly said in the initial *Jade Street*, just like
16 corporations, members of an LLC can't hide behind the shield
17 of the LLC for it's negligence. It's black letter law that
18 you can't hide behind the shield of the LLC or a
19 corporation, or any entity for your intentional acts. I
20 mean, that's long held jurisprudence in South Carolina.
21 There is no novel -- no novel issue of law in respect to
22 that. Okay? Now, the -- and that's what we're talking
23 about here. The statute requires a showing of intentional,
24 willful and wanton acts.

25 THE COURT: So basically the argument -- the old

1 argument that a corporation has no body to imprison is
2 essentially what you're making. There's no corpus to punish
3 with a corporation. And if you're talking about criminal or
4 intentional acts you've got to find a human being somewhere,
5 whether it's the CEO or the sole shareholder.

6 MR. KRAWCZYK: I think even -- *Jade Street*, one, made
7 it clear what the court wants to do on negligence. You take
8 it a step further, which is intentional -- and, you know,
9 again, that's first year law school stuff. If you
10 intentionally hurt somebody, no matter under what guise you
11 are doing it, you can't hide behind your corporate shield in
12 that respect for your responsibility on that. And, I mean,
13 that's what we have here. We have an intentional act. And
14 I think it's well established jurisprudence in South
15 Carolina. The reason why there's no case on it is because
16 it's just so flatly obvious. If you commit fraud, if you
17 intentionally create this violation of the statute, you're
18 going to be held personally liable for it. There's -- you
19 know, so I think, you know, to think of in terms of does the
20 -- is this a novel issue of law. No, Your Honor, it's not.
21 And I think again it's one step above *Jade Street*. We're
22 not even talking about negligence here. We're talking about
23 an intentional act.

24 I don't know if that addresses your concerns or if you
25 have any other concerns that you're looking at here. I

1 think within the pleadings, within the -- I mean, our answer
2 and counterclaims we requested attorney's fees. . We had
3 allegations in there that Mr. Terlizzi personally sought
4 more money than he was entitled to under the mechanic's
5 lien. All those things. So I think he's picking and
6 choosing what he wants to bring before the court. But the
7 reality is all of this was argued, not only in memorandums
8 before the law, but extensively in, what was it, three years
9 that we've had on this, Your Honor, essentially. And now he
10 wants -- you know, he hasn't brought any new arguments in.
11 And again, I think to the extent that I would just request
12 the court, you know, to keep it's present course.

13 THE COURT: All right. Let me hear from you then on
14 the motion for reconsideration concerning the court's
15 finding on the merits granting summary judgment to the
16 Defendants on the actual mechanic's lien. If you want to go
17 ahead and make a record of that, feel free.

18 MR. COOK: Your Honor, I would be glad to. Can I just
19 briefly respond?

20 THE COURT: If you want to, yeah, certainly.

21 MR. COOK: If those arguments were made in the
22 pleadings it wouldn't be a difficult matter to point out
23 somewhere where it was argued. It wasn't, Your Honor. *Jade*
24 *Street* came up in the context of the order he submitted
25 based upon your Form 4 ruling. That was the first time *Jade*

1 Street ever got mentioned. It's a little hard to
2 preemptively address something that first gets mentioned in
3 the order in the first place, Your Honor. The record is
4 devoid of any pleading that seeks attorney's fees against
5 Mr. Terlizzi in connection with the mechanic's lien action.
6 There is none, Your Honor. And this is another argument,
7 Your Honor. Even if all of that is correct about, you know,
8 that you can't punish the corporation so you have to go
9 beyond it to the shareholder, or in this case the member of
10 the LLC, that is a -- whether that's permissible is an
11 entirely separate issue for how do you posture it to get the
12 court to do that, which is the argument that I'm making is
13 that it was never postured in the -- you have to put people
14 on notice that this type of claim is going to be against
15 them, and notice in the law is done by the pleadings, and
16 there's simply an absence of any pleadings requesting this
17 relief. And if they don't request it, Your Honor, it's not
18 improper -- it's improper for you to give it. And to
19 include it in the proposed order that you request it, that's
20 too late to raise the issue in the first time that way.
21 I've looked through this memorandum of law. It's 21 pages,
22 Your Honor. I don't see *Jade Street* mentioned in there, and
23 I don't see anything requesting attorney's fees against Mr.
24 Terlizzi. If it is, I've overlooked at, and it should be a
25 simply matter for Mr. Krawczyk to point it out if it's in

1 there. That's my response to what he said, Your Honor.

2 With regard to the other -- the other thing.

3 THE COURT: And that's something I'm not -- my silence
4 shouldn't be interpreted as just me dismissing you. That's
5 something I'm going to need to look through a little bit
6 more myself. So I appreciate your argument.

7 MR. COOK: Your Honor, I've looked. I haven't found
8 it. If it's there, it's going to be picked out by Mr.
9 Krawczyk. He can point it out to you.

10 THE COURT: I have most of this in my computer. I'm
11 going to consider that argument, because that's something
12 that I have not as yet really thought as hard about as you
13 have, so....

14 MR. COOK: Well, Your Honor, I know you probably don't
15 remember, because I have a vague recollection of it. But
16 when we were initially arguing summary judgment none of that
17 was brought up, to my recollection. It wasn't until the
18 order that you requested was there anything -- and that was
19 in the proposed order that Mr. Krawczyk submitted where this
20 issue first came up as to including him personally as being
21 liable for the attorney's fees, which just strengthens my
22 argument that it never was pled and there never was any
23 notice of it, Your Honor.

24 THE COURT: All right.

25 MR. COOK: All right. With regard to the merits, Your

1 Honor -- and I'll be quite frank with you, Your Honor.
2 Obviously you know this. The motion for reconsideration is
3 to posture the thing for an appellate purpose more than I
4 want to argue all 12 of these points ad nauseam to you.

5 THE COURT: I know. I understand.

6 MR. COOK: I've told you what my biggest concern at
7 this stage with your order is. However, I do ask that the
8 court make a specific ruling. This is the case where you
9 remember they initially filed -- the mechanic's lien was one
10 figure, and then subsequently in the litigation by
11 stipulation it was reduced. And that stipulation and
12 reduction took place about three and a half months before
13 they even filed their motion for summary judgment on the
14 basis that it was so large it would show, you know,
15 intentional bad faith and all that.

16 Your Honor, I've asked the court, as part of my motion
17 for reconsideration, to specifically rule on the issue as to
18 what was the amount of the mechanic's lien at the time they
19 filed their summary judgment motion. We filed our
20 stipulation on September 24th, 2013 reducing the amount
21 sought to \$48,864.23. The motion for summary judgment on
22 the basis that that was an invalid claim was filed on
23 January 9th, 2014, which would be about three and a half
24 months later. So I do think that I would potentially lose
25 the right to make this argument if I did not specifically

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1 request that you make that finding. And in connection with
2 that, I had -- it had been my argument -- if I didn't
3 articulate it, that's my fault. But it certainly was my
4 thought that if the Defendants have waived their right to
5 seek a dismissal on the basis of the lien being some too
6 high invalid number, as they allege, once that -- once the
7 matter was corrected the way they asked that it be
8 corrected. And I would ask that the court rule on that
9 issue. And by waiting to make the motion after the problem
10 was fixed, they then waived the right to complain about the
11 additional filing of the mechanic's lien.

12 THE COURT: All right. My recollection was that -- and
13 this was somewhat central to the court's ultimate ruling.
14 My understanding of the facts is that certainly there was
15 some testimony that the objective was to put the Bohelers
16 over a barrel by filing a lien so high they couldn't bond
17 off it. Even discounting that testimony entirely, even
18 setting all of that aside, assuming that that was never even
19 said, clearly when Mr. Terlizzi or his company filed the
20 lien, based upon his deposition testimony, it was -- and I
21 think it's been characterized here several times as merely a
22 guesstimation. A guess. A shot in the dark. Nothing
23 really substantiating that figure. So then the Bohelers
24 have to bond off the lien. I think they zeroed out their
25 401K, or their retirement, or something like that. And I

1 believe that for some period of time they were seeking -- or
2 they were arguing that this lien could not possibly be
3 corrected. It's way too high. And I think two years of
4 litigation goes on before finally the Plaintiff agrees to
5 cut the lien by more than 50 percent. By 60 percent or so.

6 What am I leaving out? Am I characterizing this
7 correctly? I mean, because that was what I had an issue
8 with is the --

9 MR. COOK: Actually, before the litigation was filed,
10 Your Honor, we sought an accounting specifically to have
11 them -- to show how much they had in material and labor in
12 it, before the lawsuit was even filed, after the lien. And
13 the communications were specifically so that we could know
14 exactly what the proper bond amount -- bonded out and
15 litigate the issues, and Mr. Terlizzi refused to do that.
16 And it wasn't until two years later, after he had been
17 exposed in his deposition, that he reduced the lien to the
18 money that he had, or he could allegedly have in material
19 and labor in the job. That was basically the timing.

20 So that's not -- I mean, I understand what the court's
21 asking, but that's not relevant to what my argument is, I
22 don't believe, which is this. Did they wait too long to
23 file their motion.

24 THE COURT: They could not have possibly filed their
25 motion though -- the amount of the lien, or the legitimacy

1 of the total lien amount, was always in dispute. And I feel
2 it's central to the damages that the Defendants suffered the
3 fact that it took so long and they incurred such an expense.
4 And mind you, this money has been tied up in the clerk of
5 court's office for two years plus, maybe going on three
6 years. And had the lien amount -- at the inception of this
7 litigation had the lien amount been an actual concrete
8 figure, had the Plaintiff done his due diligence and come up
9 with a realistic number, instead of simply recklessly
10 guessing, that's what the order -- or that's what the
11 concern of the court is. And I understand your argument
12 that maybe they waited too long to file their motion for
13 summary judgment, or perhaps to -- is your argument
14 essentially that they're piggybacking the reduction of the
15 lien on the motion for summary judgment to substantiate why
16 the lien should be dismissed or -- I'm trying to get --

17 MR. COOK: In your order you certainly imply, if not
18 outright say, that the fact that he reduced the lien is
19 supportive of the claim that the original lien amount was --
20 was in bad faith. My words, not yours. So, I mean, to a
21 certain extent, sure they did. But, Your Honor, Mr.
22 Terlizzi's deposition was taken in October of 2012. Okay?
23 That's what -- he just said that's when he was exposed and
24 that's when he found out about how the calculation had been
25 done. And it was not until January of 2014 that the motion

1 for summary judgment was filed.

2 So my point is this. What's the lien at the time the
3 summary judgment motion was filed. Is there any longer a
4 lien for \$106,000. My contention is no. That it's what
5 it's been reduced to. And there hasn't been any allegation
6 made that that reduced figure would be subject to being
7 dismissed on the statutory basis that you dismissed the lien
8 on.

9 MR. KRAWCZYK: That's not accurate, Your Honor. There
10 has been an argument made, my initial thing, that he can't
11 have it -- excuse me, Your Honor. He can't have it both
12 ways. Either -- either it's all one lien or it's a new
13 lien.

14 THE COURT: If it's a new lien, it's too late.

15 MR. KRAWCZYK: And it's --

16 THE COURT: Right.

17 MR. KRAWCZYK: And so, you can't reduce a lien and then
18 call it a new lien. It's either -- it's either the same
19 lien or it's not. Either it's just a reduction of the
20 original lien, and thus still subject to attack for its
21 original filing, which is what my clients had to bond off,
22 or it's a new lien and it's out of time.

23 Now, again, I'm not trying to get back into that
24 argument. But first of all, I don't think Your Honor -- I
25 think he can ask for it. Your Honor doesn't have to

1 specifically give any, you know, specific answer to that.
2 But because -- I believe what Mr. Cook is saying is that
3 because they changed the lien, before we could file our
4 motion for summary judgment, we win because, you know -- you
5 know, we admitted it and we reduced it. It doesn't work
6 that way.

7 THE COURT: I'm a little worried about the practical
8 effect of what you're suggesting. There's case law out
9 there under the mechanic's lien statute that presupposes
10 that dismissal of a lien outright could be done if it's
11 shown that there was bad faith on behalf of the contractor.
12 And that's the case law that this court is relying on. If
13 what you're saying is correct and a plaintiff contractor can
14 file a lien and then reduce it, what's to prevent the exact
15 situation that we have in this case from reoccurring. I can
16 see an honest mistake. I can see, okay, well, I transposed
17 some digits, and instead of \$100,500, it's \$100,900 or
18 something. I can see allowing modification. I don't think
19 that the courts would have any problem with that. I don't
20 think that the Defendants in this case would have had any
21 problem with that. But if you can establish a lien or file
22 a lien to the tune of \$100,000 and then voluntarily reduce
23 it years later, after the Defendants had to bond off it,
24 deal with the lis pendens, all that other good stuff, and
25 defeat the Defendants' argument that, hey, judge, the entire

1 lien should be dismissed because of their bad faith in the
2 inception -- at the inception of this lien, there would be
3 no way -- you would simply encourage a plaintiff, from a
4 public policy standpoint, to file a lien of a million
5 dollars, even though all they can prove would be \$25,000
6 because they're always at liberty, once they're called on
7 that, to knock it down to 25 and not suffer any
8 consequences. I'm a little concerned about the public
9 policy of what you're advocating.

10 MR. COOK: Some of what you say is not unreasonable,
11 Your Honor. But here's -- we weren't facing the summary
12 judgment motion. But do we want to encourage plaintiffs to
13 make corrections if they feel that they should? Because
14 that's the opposite -- that's the exact opposite but it's
15 equally true.

16 THE COURT: That is true.

17 MR. COOK: And we weren't under the threat of going to
18 court under the old lien figure on their motion for summary
19 judgment because they didn't file up to three and a half
20 months after we altered the thing.

21 And, Your Honor, the original lien amount had already
22 been heard by a different judge before the complaint was --
23 when we filed the lien initially they went to court on a
24 motion to dismiss.

25 THE COURT: Yeah, but that's pretty perfunctory.

1 MR. COOK: Well, it is, Your Honor. But what position
2 does that put me in as an attorney when I've already had one
3 court say it is not going to be dismissed at that amount.

4 THE COURT: I understand that one court has already
5 said that. But that's kind of akin to a magistrate
6 establishing probable cause in a criminal hearing. It
7 doesn't take a whole heck of a lot.

8 MR. COOK: Here's the thing, Your Honor. Let's say --
9 it sounds like some of Your Honor's concerns come from what
10 was the impact on the Bohelers. I don't really know that
11 that's something that the court, in terms of how they make
12 the ruling, that it addresses any of the elements of what
13 we're talking about. But, Your Honor, they just -- I just
14 went through a laundry list of claims that they've asserted
15 against my client. They are going to have the chance to get
16 damages aplenty if they're able to prove these things
17 against Mr. Boheler. The question is, what are they
18 entitled to within the connection of defending the
19 mechanic's lien. Because that's all the summary judgment
20 motion was based upon. And my point is that to the extent
21 there was a legitimate problem, we fixed it exact -- we
22 fixed it before they asked that the lien be dismissed. And
23 I think that's -- I think that's significant, Your Honor.

24 THE COURT: Okay. Well, just so the record is clear.
25 The fees that were claimed by counsel -- I forget about the

1 -- the total amount, I think, was in the 45,000 range. I
2 think we went through and determined that a lot of those
3 fees were not going to be chargeable against the mechanic's
4 lien action. And I want to say -- I don't have that order
5 right in front of me, but it was around 33 that -- or
6 somewhere in that neighborhood, 30s, low 30s, that I did
7 award or did attribute to the mechanic's lien once I went
8 through it line by line.

9 Anything further?

10 MR. COOK: Along this particular line, or just
11 generally speaking?

12 THE COURT: Generally speaking. Anything else you want
13 to put on the record?

14 MR. COOK: There's one thing I'd like to bring up --

15 THE COURT: Sure.

16 MR. COOK: -- to Your Honor's attention. A lot of the
17 background of this particular transaction between John
18 Harding, Terlizzi Home Improvement and the Bohelers really
19 wasn't -- we started -- we got into other issues once the
20 motion hearing began. In both -- and the only two
21 depositions that have been taken are Mr. Boheler's
22 deposition and Mr. Terlizzi's deposition. Mr. Boheler
23 acknowledged that at the very beginning the contract -- the
24 only written contract between the parties was entered into,
25 not because they thought the house was going to be built

1 according to that contract, but solely so -- it had to be
2 done by April 30th so that the Bohelers could get a tax
3 credit by having a written contract to build enforce, Your
4 Honor. And that's at pages 40 and 41 of his deposition.
5 And Your Honor will probably recall that one of the issues
6 was a gentleman named John Harding who had an on again, off
7 again relationship with my client. The Bohelers say he's
8 agent partner of my client. My client says it was something
9 totally different. Your Honor obviously was more persuaded
10 that the facts showed what the Bohelers said it was. But
11 what is undisputed is that Mr. Harding initially was
12 overseeing the job and a lot -- the bulk of what has
13 actually been paid by the Bohelers was paid for work that
14 was done during the time that Mr. Harding was overseeing the
15 job. Mr. Boheler admitted that once he got dissatisfied
16 with Mr. Harding he hooked up with Mr. Terlizzi, as the
17 principal of Terlizzi Home Improvement, and said I want you
18 to come out here and be in charge of this. And Mr.
19 Terlizzi's testimony is, this is 159 through 161, is that
20 Mr. Boheler agreed to paid for extras and all that. Because
21 basically when he went out there what Mr. Terlizzi said was
22 there is no way you can get what you've been promised by
23 John Harding for that contract amount. And bear in mind
24 that this was a contract that Mr. Boheler testified he knew
25 would have to be changed, because the original contract was

1 just to get the tax credit.

2 So Your Honor has concluded, based upon very skillful
3 argumentation by counsels, that Mr. Terlizzi is just coming
4 up with these figures and trying to bluff his way into this,
5 without understanding that a lot of the work was done before
6 he even got out there and he was trying -- and as a result,
7 he was -- had difficulty arriving at some of those figures
8 initially. And, in fact, he even stated that some of the
9 bills had not yet even been -- come in at the time the
10 mechanic's lien was filed. So it has been postured as if it
11 was all this effort by Mr. Terlizzi to put them over a
12 barrel and then tried to take advantage of them, when, in
13 fact, a full evidentiary review would show something that
14 there's more sides to it than just that. You have this
15 nebulous contract that both sides agree was something
16 different from what was written. Now, what was it? It was
17 never reduced to writing again, but they all -- everybody's
18 in agreement that there are other things out there. Is
19 there a dispute about what those other things were and what
20 was going to be part of it and what wasn't? Yes. But Mr.
21 Boheler concedes that the house was not built to be built
22 the way the original contract was stated.

23 And, Your Honor, I believe all that goes into the
24 issues about who party agent is and how good faith the
25 estimate of the figures that Mr. Terlizzi came up with, and

1 I just don't think that's been fully aired out. And so that
2 -- that honestly kind of goes to the merits of why I don't
3 think summary judgment should have been granted in the first
4 place. It's a more nuanced case than -- than perhaps what
5 Your Honor has considered up to this point.

6 THE COURT: All right. Do you want to speak to any of
7 that before I --

8 MR. KRAWCZYK: I mean, I don't know how much I need to
9 speak to it, Your Honor. He's talking in contract and we're
10 talking about the mechanic's lien statute which says
11 material and labor used on the job. And all you have to do
12 is add up your bills and you file your lien. That's all you
13 have to do. And that was fully flushed out in his
14 deposition. And I know Your Honor saw that. And so, all
15 those things he's talking about go to contractual issues,
16 not to the lien. And so, I guess, to that extent, they're
17 not relevant to what we're talking about today.

18 THE COURT: Any plaintiff is the captain of his own
19 case. He gets to choose what causes of action he could
20 bring. And clearly in this case they clearly could have
21 brought a cause of action for breach of contract and been
22 very vague in their damages. And had the Plaintiff brought
23 that action we probably wouldn't -- I know they did bring
24 the action, as well as quantum meruit. But the mechanic's
25 lien statute, because it affords such traumatic remedies, or

1 drastic remedies, there are reasons that has to be strictly
2 complied with. We're not talking about a minor lawsuit when
3 you're talking about a mechanic's lien action. It basically
4 makes it impossible for anyone else to do any kind of work
5 on an uncompleted home. And that is problematic for people
6 who have contracted to have their homes built. It's
7 problematic for buyers. If the Terlizzis -- I'm sorry, if
8 the Bohelers had been unable to bond off that lien we would
9 be going forward with probably a foreclosure action. Their
10 counsel never would have probably even had an opportunity to
11 get involved in this case and they'd essentially be
12 homeless, all because of potentially a fraudulent -- all
13 because of a fraudulent lien being filed against them. A
14 lien that had no basis in fact. I understand the position
15 that maybe the contract had not been finalized, or that the
16 contract had been modified, or there was some additional
17 items on the punch list. But again, I'm limiting this to
18 the mechanic's lien action and to the remedies that the
19 Plaintiffs attempted to afford themselves under that very,
20 very drastic statute. I shutter to think what would have
21 happened if the Bohelers hadn't been able to bond off that
22 lien. If they weren't in that kind of position. As a
23 matter of public policy, I think about 95 probably percent
24 of individuals are not going to be as fortunate as the
25 Bohelers and have the liquidity or the financial resources

1 to bond off such a lien. That's extremely unusual in my
2 experience.

3 I'll take -- I'll take everything that's been said into
4 consideration and I anticipate having an order out by
5 tomorrow on this. Obviously I appreciate you all rearguing
6 and making a record and perhaps giving me some things to
7 reconsider and think about again.

8 One housekeeping matter. I know that you did send me -
9 - I've changed clerks since you sent me the order to release
10 the mechanic's lien.

11 MR. KRAWCZYK: That is one remaining issue, if I could
12 address the court while we're here.

13 THE COURT: Sure, go ahead.

14 MR. KRAWCZYK: Obviously, although the lien's been
15 reduced, it's still a huge financial burden to the Bohelers,
16 and with the idea, and already the posturing if this will go
17 to appeal --

18 THE COURT: Right.

19 MR. KRAWCZYK: -- I don't know whether the appeal would
20 stay the court's order to dismiss the lien or not. I think
21 it's unclear what happens with that. And clearly that is --
22 would again still be a devastating result for my client.
23 And I believe I've requested to the court, to the -- this is
24 a money judgment, that to the extent that the court -- that
25 he does appeal that the court require -- in order to get a

1 stay of the execution of that judgment, that the court
2 require that he bond it off. To the same extent that, you
3 know, my clients have been required to bond off the
4 mechanic's lien. So that was something I did request to the
5 court on several occasions and --

6 THE COURT: Is that -- they recently changed the rule
7 on that, did they not, where this court has authority over
8 the bond?

9 MR. KRAWCZYK: You have the authority.

10 THE COURT: It's no longer the appellate court's? All
11 right.

12 MR. KRAWCZYK: There's two ways. One is -- I believe,
13 Your Honor, that the trial court has the authority in order
14 to stay the execution of a money judgment, has the authority
15 to require a bond. And then the issue of whether it stays
16 the dismissal of the mechanic's lien, I don't know of that,
17 Your Honor. I'm just -- I'm just preparing for the worst.

18 THE COURT: The appeal would necessarily -- or would
19 probably stay the absolute dismissal, a res judicata, on the
20 question of the mechanic's lien. The money that your
21 clients have put on deposit with the clerk of court, it's my
22 intention to sign an order releasing those funds back to
23 them. If -- my understanding procedurally could be wrong.
24 But when the appeal is filed, if the Plaintiff wants to have
25 that order superceded they're going to have to go to the

1 court of appeals. However, under the change in the rule, I
2 think that you are correct that I can require that they --
3 if they seek a stay of the order refunding your client's
4 money, I can then require a bond of them.

5 MR. KRAWCZYK: That's what I understand.

6 THE COURT: I think that's the way the rule works. I
7 may have to double check that, folks.

8 MR. COOK: You all are talking a language that I don't
9 understand, Your Honor.

10 MR. KRAWCZYK: Yeah. And I think -- I think you're
11 correct, Your Honor.

12 THE COURT: I think that's right. If you're going to
13 seek absolutely -- if you're going to seek an absolute stay
14 --

15 MR. COOK: You mean to prevent the money from being
16 returned?

17 THE COURT: -- to prevent the money from being returned
18 to the Boheler folks you're going to have to go to the Court
19 of Appeals. If the Court of Appeals should decide that
20 you're right, I would then address the issue of bond. Or do
21 I address it now?

22 MR. KRAWCZYK: No. I think you would address it at the
23 time of appeal, because as soon as he seeks a stay of that
24 order.

25 THE COURT: As soon as he seeks a stay of the order

1 through the Court of Appeals, that's when I still retain
2 jurisdiction in order to address the question of bond.

3 MR. KRAWCZYK: That's correct, Your Honor.

4 THE COURT: I think that's correct.

5 MR. KRAWCZYK: And that is, again, to keep people from
6 appealing and, you know -- just for the purpose of delay.

7 THE COURT: Correct. I think that's why they changed
8 the rule. But it has been since the bar convention in
9 January that I've been instructed on that and this issue has
10 not arisen. I think that's correct. I'll take a second
11 look at it.

12 MR. COOK: Your Honor, may I ask one -- make one
13 inquiry to the court?

14 THE COURT: Sure, please.

15 MR. COOK: Is there any chance that you're the chief
16 administrative judge for this circuit?

17 THE COURT: Yes.

18 MR. COOK: For common pleas?

19 THE COURT: Yes.

20 MR. COOK: This case will appear on a non-jury trial
21 roster for, I believe, the week of November 10th.

22 MR. KRAWCZYK: In Newberry County.

23 MR. COOK: That's right, yes.

24 THE COURT: November 3rd, because I think I'm --

25 MR. COOK: November 3rd.

1 THE COURT: Yeah.

2 MR. COOK: It is certainly my belief that I would be
3 authorized to file an appeal of this. And although this
4 would be just the appeal of the mechanic's lien issue, it is
5 inextricably tied up to their counterclaim and other things.
6 And I would ask the court to -- to strike it from the non-
7 jury roster so that he and I don't have to worry about
8 preparing for a case that's never going to go forward in the
9 first place.

10 THE COURT: I'm inclined to do that.

11 MR. KRAWCZYK: I mean, I would assume that's would
12 happen anyway, Your Honor.

13 THE COURT: Yes..

14 MR. COOK: Well, I just -- I would prefer not to have
15 to go to Newberry to argue that in front of the judge,
16 because --

17 THE COURT: I'm the judge for that term of court
18 anyway. You probably could have just given me a heads up
19 and I would have told whoever it was -- even though I wasn't
20 the judge, I would have told them we aren't going to try
21 this one. It's taken care of.

22 MR. COOK: Thank you, Your Honor.

23 THE COURT: Thank you all.

24 - - - END OF TRANSCRIPT OF RECORD - - -

25

1 Certificate of Reporter
2

3 I, the undersigned, Tara T. Scott, Official Court
4 Reporter for the Eighth Judicial Circuit of the State of
5 South Carolina, do hereby certify that the foregoing is a
6 true, accurate, and complete transcript of record of all the
7 proceedings had and evidence introduced in the trial/hearing
8 of the captioned case, relative to appeal, in the Court of
9 Common Pleas for Newberry County, South Carolina, on the
10 16th day of October, 2014.

11 I do further certify that I am neither of kin, counsel,
12 nor interest to any party hereto.

13
14
15 Tara T. Scott

16 Tara T. Scott, CVR

17 Circuit Court Reporter

18 Greenwood, South Carolina

19 February 16, 2015
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