IN THE DISTRICT COURT OF APPEAL
SECOND JUDICIAL DISTRICT
STATE OF FLORIDA

ROBERT J. KRUSE & CATHIE J. KRUSE,

Lower Tribunal No. 2002-CA-5137
2DCA No: 2D07-5489

Appellants/Cross Appellees,

v.

HOMES BY DERAMO, INC. a Florida Corporation, AND VINCENT WILLIAM DERAMO (a.k.a BILL DERAMO), Individually,

Appellee/Cross Appellants.

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# INITIAL BRIEF

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On Appeal from the Circuit Court of the Twelfth Judicial Circuit
in and for Sarasota County, Florida.

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## STATEMENT OF THE CASE

The appellants, Robert J. Kruse and Cathie J. Kruse (hereinafter collectively, "Kruse"), appeal the Final Judgment for amount due and foreclosure entered on November 15, 2007 following a jury verdict in favor of appellees, Homes By DeRamo, Inc. and Vincent William DeRamo (hereinafter collectively "DeRamo") on the ground that the verdict on the fraudulent lien claim is against the manifest weight of the evidence. Kruse also appeals the denial of a motion for new trial based on the fact that the cumulative effect of the several erroneous orders and rulings entered prior to and during the trial resulted in a fundamentally unfair trial to Kruse. Additionally, Kruse appeals the denial of their motion for remittitur on the ground that the verdict was in excess of the amount sought by DeRamo at trial, and a foreclosure judgment in excess of the lien amount was entered.

Kruse argues herein that the following court rulings and orders prior to and during trial had the cumulative effect of denying Kruse a fair trial:

1. The trial court's Order Granting DeRamo's Motion in Limine to Exclude Evidence of DeRamo's Failure to File I.R.S. Form 1099 dated September 5, 2007 (the "1099 Order"), which had the effect of preventing Kruse from presenting evidence to the jury concerning DeRamo's breach of the Construction Agreement, DeRamo's inability to substantiate the labor charges, and DeRamo's lack of credibility.

2. The trial court's Order Denying Kruse's Motion in Limine to Exclude Evidence of Kruse's Net Worth, Stock Portfolios, Photos of the Residence and Other Matters dated September 12, 2007 (the "Financial Worth Order"), which had the effect of prejudicing the jury against Kruse based on his financial status.

3. The trial court's Order Granting Plaintiff's Motion in Limine Striking Defendant's Witnesses dated September 12, 2007, and the court's ruling at trial on DeRamo's reputation evidence, both of which prevented any rebuttal testimony about DeRamo's reputation even though DeRamo introduced evidence of his good reputation at trial.

Kruse also argues that the trial court's instruction to the jury on DeRamo's defense under section 713.31(2)(b), Fla. Stat. that he relied on his counsel's advice in compiling the lien was erroneous because DeRamo failed to present sufficient evidence to support that instruction. Also in error was the trial court's pre-trial order granting summary judgment in favor of DeRamo on Kruse's fraudulent lien claim against DeRamo, individually. Kruse also argues that the court erred when it denied Kruse's Motion for Remittitur or for a New Trial on the ground that the verdict for sum certain amount due was contrary to the evidence. Finally, Kruse argues that the court erred when it denied Kruse's Motion for a New Trial based not only on the foregoing enumerated errors at trial, but also because the verdict on Kruse's fraudulent lien claim was against the manifest weight of the evidence.

References to the record on appeal are designated (R.Vol.___, p.____), or (Supp. R. Vol.___, p.__) for the supplemental record. References to the pages in the Transcript of the trial are designated (Tr. ____), and references to the exhibits admitted into evidence at trial are designated (Ex._____). Documents contained in the tabbed Appendix for the Court's convenience are designated by tab number using the page numbers therein (App.____, p____).

## STATEMENT OF THE FACTS

### A. Background Facts

On January 9, 2000, Kruse and DeRamo entered into a Construction Agreement (hereinafter, the "Agreement") for the construction of a house for Kruse (hereinafter, the "Kruse job"). (Ex. 1, Tr. 271.) The Agreement is a "cost-plus" contract requiring Kruse to pay the construction cost plus ten percent of the costs to DeRamo for his fee. (Ex. 1, Tr. 271-2.) The Agreement states that the total cost of construction is $1,767,700.00. (Id.) The Agreement required DeRamo to determine the "exact" cost of construction, (Ex. 1: Art. IX.1; Tr. 487-88), and pay all taxes and comply with all laws, ordinances, rules and regulations. (Ex.1: Art. V.(5) and (6).)

On January 23, 2002, the Certificate of Occupancy was issued. (Tr. 419.) At the preliminary closing on January 14, 2002, DeRamo met with Kruse and sought another $408,773.00. (Ex. 17, Tr. 555, 517.) By that date, Kruse had already paid DeRamo $2,578,819.00 in draw payments. (Ex. 16, Tr. 560; Tr. 603,

Ex. 11.) DeRamo and Kruse executed a written agreement to limit DeRamo's ten percent fee to $200,000.00. (Ex. 18, Tr. 419-20; 561; 1404-06.) In exchange, Kruse paid DeRamo the $408,773.00 DeRamo sought from Kruse. (Tr. 561.)

On March 13, 2002, DeRamo again met with Kruse, seeking another $25,025.82. (Ex. 31, Tr. 571-72.) By that date, Kruse had paid DeRamo a total of $2,987,592.00. (Tr. 1592; 572.) Kruse testified that at that second preliminary closing on March 13, 2002, just as with the preliminary closing in January, DeRamo brought only a document with some handwritten numbers, and no other documentation of cost. (Tr. 1411, 1413-14; 570-71, Ex 31.) An argument ensued and DeRamo left. (Tr. 1415; 677-78.) Kruse received no other documentation prior to DeRamo's suit. (Tr. 574-75; 578-79; 1413)

Thereafter, on April 9, 2002, DeRamo filed suit against Kruse for the breach of contract. (R. Vol. 1, p. 1-8.) DeRamo filed three Claims of Lien in connection with the Kruse job. The first Claim of Lien was filed on April 19, 2002 and sought the sum of $69,501.43 from Kruse. (Tr. 582, Ex. 7.) The Amended Claim of Lien was recorded on June 20, 2002, and sought $81,693.14. (Tr. 590, Ex. 8.) Five days later on June 25, 2002, DeRamo filed a Second Amended Claim of Lien, seeking a total of $80,365.64. (Tr. 430; 590-591, Ex. 9.) DeRamo eventually amended his complaint to add a foreclosure of the lien count. (R. Vol. 1, p. 52-72.)

Kruse defended against DeRamo's claim and counterclaimed alleging, *inter alia*, that DeRamo breached the Agreement by failing to calculate the exact cost of construction, and by failing to comply with the contractor duties under the Agreement. (R.Vol. 11, pp. 2161-63.) Kruse's theory was that DeRamo deliberately maintained inadequate records so that the cost of construction of the Kruse job could not be substantiated. In addition to breach of contract, Kruse alleged that DeRamo filed fraudulent claims of lien. (R. Vol. 11, pp. 2164-65.)

## B. Kruse's Claims and Defenses at Issue

### 1. DeRamo Failed to Keep Accurate Records Generally, and Failed to Substantiate the Labor Cost in Particular.

Although DeRamo was aware that he had a duty to maintain accurate records under a cost-plus contract (Tr. 490), DeRamo failed to maintain the construction records so crucial in determining the cost of construction of the Kruse job. DeRamo discarded the alleged notes related to the hours that his employees worked (Tr. 526), discarded subcontractor's bids (Tr. 526), discarded the notes from any budget meetings with Kruse (Tr. 538), and discarded the notes related to his calculations of the draw requests. (Tr. 610).

The gravamen of Kruse's counterclaim against DeRamo was the unreliability of the labor cost for DeRamo's full-time labor crew for the Kruse job. DeRamo claimed the labor cost totaled $276,109.00. (Ex. 4 and 6; Tr. 1233.) DeRamo's expert, Michael Walker testified that DeRamo's labor cost was justified

in the end based on the "value" of the home. (Tr. 854.) Kruse's expert, Hank Gerkin, testified that based on the plans, the labor cost should have totaled no more than $126,000.00. (Tr. 974-75; 981-82; Ex. P.) Kruse's accounting expert, Richard Goble, reviewed DeRamo's labor records and could not audit or verify DeRamo's labor cost because DeRamo's labor records were "grossly inadequate." (Tr. 1200-1203.)

Twenty-one laborers worked for DeRamo on the Kruse job throughout the project. (Tr. 479-80.) DeRamo claimed he utilized independent contractors to supply the labor for the Kruse job, although he had a regular group of workers. (Tr. 488-89.) During the pendency of the Kruse job, DeRamo was constructing seven other custom homes, some on a fixed-price basis, and renovating his own home. (Tr. 385-386; 559.) DeRamo used the same crew of laborers on all of his jobs and paid each laborer with one weekly paycheck that references the various jobsites. (Tr. 339-340.)[1] DeRamo testified that he apportioned the laborer's pay, writing the checks from memory. (Tr. 490-93; Ex. 29.)[2] DeRamo would apportion the laborer's weekly pay among the various jobs, recording the amounts in the

[1] Discovery analysis of the checks and ledgers revealed that DeRamo charged to Kruse labor performed on DeRamo's own residence. DeRamo admitted this wrongful charge. (Tr. 386-89; 579-80.)

[2] DeRamo testified that he also used his job notes or job sheets (Tr. 491), which he clarified were the labor ledgers, (Tr. 493-94), and then DeRamo testified that his job notes were written at the site and then discarded. (Tr. 525-26.)

ledger up to a week later. (Tr. 523-24.) DeRamo admitted to an error rate of up to ten percent (10%). (Tr. 480-482)[3]. At trial, DeRamo maintained that the labor ledgers were "100% accurate" (Tr. 526), but the jury also heard DeRamo characterize all of his ledgers as "fairly" accurate. (Tr. 1700.) Moreover, DeRamo admitted that there was some labor contained in the ledgers for the subcontractors for materials, and that there was no way to determine the amount of labor embedded in the subcontracts. (Tr. 1687-89, 475-79.)

Although DeRamo's handwritten checks and labor ledgers contained errors, the labor cost on the Kruse job could not be verified because DeRamo kept no timecards and used no sign in sheets for his laborers at all. (Tr. 479.) Additionally, DeRamo has no invoices or agreements from these allegedly independent contract laborers for labor performed on the Kruse job. (Tr. 489.) Except for a single-entry, handwritten ledger and copies of checks he had written to his laborers, DeRamo maintained no other records for labor on the Kruse job. (Exs. 4 & 6, Tr. 522-23; 1202.)

[3] Over four years after testifying under oath to an error rate between 5 and 10 percent on the labor charges, DeRamo substantially amended this portion of his January 28, 2003 deposition testimony via an Errata Sheet, dated March 21, 2007, stating that he did not at the time understand the question. (See Ex. M, Tr. 480-487.) DeRamo testified at trial that he knew the exact hours each laborer worked at each job (Tr. 480) and then clarified that he, in fact, could not know the exact hours each laborer worked at each job. (Tr. 486-87.)

Moreover, although DeRamo repeatedly referred to his laborers as "independent contractors" (Tr. 336, 489), the jury was not permitted to hear that DeRamo failed to prepare any tax forms, W-2s or 1099s, for any laborer on the Kruse job due to the 1099 Order entered pursuant to DeRamo's Motion in Limine (discussed *infra*.)

Furthermore, from June 5, 2002 to March 8, 2007, DeRamo misrepresented the existence of the 1099s in discovery, claiming variously that the tax records for the laborers were prepared but they were privileged, confidential, irrelevant, and unnecessary. (App. 6, pp. 2-4.) DeRamo and his secretary intimated at their respective depositions that 1099s for the Kruse job laborers were prepared. (Id. at pp. 2-3.) When specifically asked for tax documentation in a production request in 2003, DeRamo claimed that the documents were unnecessary and a violation of laborers' right to privacy. (Id. at p. 2.)

On November 4, 2004, Kruse moved to compel certain discovery including the tax documentation. (Id. at p. 3.) Again DeRamo refused, claiming that the documents contained confidential information and violated privacy rights. (Id.) At the hearing, the court denied Kruse's motion to compel without prejudice for Kruse to establish relevance. (Id.) Two years later, Kruse moved again to compel the production of these documents, and DeRamo was ordered to produce the tax

documentation by the magistrate. (Id.) DeRamo took an Exception and the judge affirmed the magistrate's order. (Id.)

Notably, in all of DeRamo's responses to the motions, in all memoranda of law, and all of counsel's arguments at hearing, DeRamo was careful not to indicate that there were, in fact, no tax records at all for labor. (Id. at p. 4.) For nearly five years, Kruse was forced to litigate the discovery of records that never existed. On March 8, 2007, compelled to produce the 1099s, DeRamo finally admitted that he had no such documentation. (Id.) Kruse was awarded $12,553.64 in attorney fees and costs against DeRamo as a sanction for DeRamo's discovery abuse, (R. Vol. 16, pp. 3050-53), but Kruse was not allowed to use the true information at trial due to the 1099 Order (discussed *infra*).

**2. DeRamo Failed to Calculate of the Exact Cost of Construction.**

DeRamo admitted that he had a duty to accurately calculate the exact final cost of construction. (Tr. 487-488, 490, 558-59, Ex 1.) Nevertheless, DeRamo testified that prior to filing the claim of lien and instituting this action, he never gave Kruse the final amount of the cost of construction. (Tr. 578-79, 580-82.). DeRamo also admitted that under the Agreement, Kruse was entitled to an "honest, full, and complete accounting" of how DeRamo spent the money on the Kruse job. (Tr. 578.) Nevertheless, prior to filing his complaint and claims of lien, DeRamo gave no documents to Kruse that supported the total cost of construction. (Tr. 572-

575.) Copies of these documents, such as DeRamo's ledgers, invoices, and copies of checks (hereinafter, the "Supporting Documents"), were provided only in discovery after the suit was filed. (Tr. 556-558; 578-79; 1696-97.) Reviewing the Supporting Documents, Kruse discovered errors in DeRamo's calculation of the charges of the Kruse job. (Tr. 579-80; 1600-1601.)

Although DeRamo acknowledged that Kruse was entitled to credit for the amount of the errors Kruse discovered (Tr. 579-580; 1691-92), DeRamo did not adjust the total to provide Kruse with a final amount for the exact cost of construction for the Kruse job. (Tr. 1690-92; 1701-02; 1776-77.) At trial, DeRamo admitted to overcharges and duplicate charges found in the various audits by Kruse and his expert which, together with the $1,183.51 credit on the Second Amended Lien, reduced the amount DeRamo was seeking by $10,255.67. (Tr. 438-439.) After deducting amounts Kruse paid him for work on other properties, DeRamo reached a final amount of $66,526.62 due on the Kruse job, in contrast to the amount of $80,365.64 listed in DeRamo's final claim of lien. (Tr. 440-441.) At no time did DeRamo amend his final claim of lien to reflect this lower number or the credits due Kruse because of DeRamo's errors.

**3. DeRamo's Fraudulent Claims of Lien**

DeRamo testified that he used his "fairly" accurate ledgers to compile the claims of lien he filed against Kruse. (Tr. 1700-1701.) In addition to DeRamo's

failure to keep accurate records in order to calculate the exact cost of construction before compiling his liens, the jury heard that DeRamo included in his claim of lien an amount of $4,241.00 for work not performed and materials not furnished to Kruse's property as well as an amount of $6,735.00 already paid for by Kruse.

On June 1, 2001, DeRamo entered into a contract with Custom Dock and Davit, Inc. ("Custom Dock") for Custom Dock to construct a dock at the Kruse job. (Tr. 1146; Ex. 19.) DeRamo gave Custom Dock a deposit in the amount of $4,241.00. (Id.) On or about April 22, 2002, after the March 13, 2002 meeting between Kruse and DeRamo ended with no exchange of payment or Supporting Documents, Kruse and Custom Dock agreed that the June 1, 2001 contract would be cancelled, and Kruse's dock would be constructed under an agreement between Kruse and Custom Dock only. (Tr. 1147; Ex. 28.) DeRamo testified that, at that point, nothing had been done on the dock. (Tr. 583.) DeRamo was aware Kruse and Custom Dock were contracting directly on April 19, 2002, (see Ex. 26.), and confirmed his understanding of this arrangement by facsimile to Custom Dock on April 24, 2002. (Tr. 587-588; Ex. 21.) At that time, Custom Dock agreed to apply DeRamo's $4,241.00 deposit towards another project Custom Dock was or would be performing for DeRamo. (Ex. 24; Tr. 1154.)

At trial, DeRamo testified that he did not know, prior to his placing his lien, whether Custom Dock had delivered any materials or performed any work on the

Kruse property. (Tr. 583-84.) DeRamo admitted that the purpose of the lien was to collect monies owed from the owner, and further admitted that he was aware that the $4,241.00 deposit to Custom Dock was going to be refunded by Custom Dock and was not owed to him by Kruse. (Tr. 585-86.) Nevertheless, DeRamo included the $4,241.00 Custom Dock deposit in all three of his claims of lien against Kruse. (Tr. 590-591.) DeRamo testified that he did so because he "had not received the credit check back from the dock company." (Tr. 590.)

Cindy Koenreich, co-owner of Custom Dock, testified that, under the June 1, 2001 contract between Custom Dock and DeRamo, no work was performed and no materials were delivered to the Kruse job. (Tr. 1147.) She further testified that when the April 22, 2002 contract between Kruse and Custom Dock was entered into, DeRamo was entitled to an immediate return of his entire $4,241.00 deposit (Tr. 1148) with no charges deducted for any preparatory work, such as the procurement of a permit. (Tr. 1157-1158.)

Ms. Koenreich testified that DeRamo's deposit was returned on July 12, 2002. (Tr. 1154-1155.) Ms. Koenreich further testified that the reason DeRamo did not receive his refund in April of 2002 was that DeRamo requested that the deposit of $4,241.00 be applied to another job. (Ex. 24, Tr. 1154-1155.) DeRamo denied that he requested such a transfer of his deposit. (Tr. 586-87.) Ms. Koenreich further testified that had DeRamo requested the return of the deposit on

April 22, 2002, DeRamo would have received the entire $4,241.00 deposit on that date. (Tr. 1158.)

DeRamo also increased his lien to include the amount of $6,735.00 which was a charge from Central Systems & Security Services, Inc. ("Central Systems"). Kruse's counsel sent DeRamo's counsel a letter stating that the Central Systems charge was not notated in DeRamo's ledger. (Tr. 593-94; 1595.) In fact, the Central Systems charge was notated in DeRamo ledger, but out of order. (Tr. 1595; 594.) Without checking the Central Systems charge or reviewing his ledgers, DeRamo increased his lien by $6,735.00. (Id.)

## C. Relevant Pre-Trial Rulings

### 1. DeRamo's Motion in Limine Regarding 1099s.

On July 11, 2007, DeRamo filed a motion in limine under section 90.403, Fla. Stat. (2007), seeking to prevent any mention of DeRamo's classification of laborers (as independent contractors) and any mention of DeRamo's failure to file tax forms for these laborers, specifically IRS form 1099 (hereinafter, the "1099s"). (R.Vol. 8, pp. 1582-1592.) DeRamo claimed that the "alleged technical breach" of the Agreement with regard to filing the 1099s would serve to confuse the jury and prejudice the jury against DeRamo. (Id. at 1583.)

At the hearing on August 15, 2007, DeRamo argued that the failure to prepare and file 1099s is a technical breach of the Agreement, but Kruse suffered no damages as a result of this breach. (Supp. R.Vol. 1, p. 8; App. 2, p. 2.) Kruse

argued that that DeRamo's failure to file the 1099s (1) breached the Agreement; (2) is relevant to the reliability and credibility of DeRamo's testimony about the labor cost; and (3) is relevant to a contractor's duty to maintain accurate records. (Supp. R.Vol. 1, p. 13; App. 2, p. 2)

The court's 1099 Order granted DeRamo's Motion in Limine, concluding that the probative value of DeRamo's failure to file the 1099s is substantially outweighed by the prejudicial effect under section 90.403, Fla. Stat. (App. 2, p. 4.) The court indicated that it did not intend to deny Kruse the opportunity at trial to make inquiries regarding DeRamo's recordkeeping of his workers, but that "those inquires should not include the fact that Deramo's failure to provide addresses for many of his workers on the Kruse job was in violation of the contract and the tax laws." (App. 2, p. 4.)

**2. Kruse's Motion in Limine Regarding Financial Status.**

On August 23, 2007, Kruse filed a Motion in Limine Regarding Net Worth, Stock Portfolios, Photos of the Residence, and Other Matters, seeking to prevent DeRamo from presenting evidence of Kruse's net worth, financial status, and stock portfolios. (R. Vol. 10, p. 1906-1908.) Kruse's Motion in Limine was intended to be heard, along with several other issues and motions, on the morning on the first day of trial. (Tr. 14.) When Kruse's counsel began arguing Kruse's Motion in Limine, the court indicated that an order had been entered thereon. (Tr. 24-26.)

The Order Denying Kruse's Motion in Limine was dated September 12, 2007 (the "Financial Worth Order"). (App. 3.) Although Kruse maintained that he refused to pay the last draw amount until DeRamo supplied him with Supporting Documents, DeRamo alleged that Kruse was having financial difficulties, which is why Kruse refused to pay. (App. 3, p. 2.) The court concluded that the jury is entitled to hear "alternative explanations" for why Kruse failed pay the final draw request. (Id.) Relying on Sossa By and Through Sossa v. Newman, 647 So. 2d 1018 (Fla. 4th DCA 1994), the court ruled that "[s]hould Kruse 'open the door' to issues involving the payment of the draws, Deramo is entitled to elicit testimony concerning Kruse's alleged inability to pay the final draw." (Id.)

**3. DeRamo's Motion in Limine to Strike Defendants' Witnesses.**

DeRamo sought to strike witnesses John and Kelly Orr and David Branch ("Orrs and Branch"), who were named on Kruse's witness list. (R. Vol. 8, pp. 1593-96.) In DeRamo's Motion in Limine, DeRamo argued that Orrs and Branch, who were also customers of DeRamo, were listed "upon information and belief" to testify about problems they had with DeRamo as their contractor. (Id. at 1594.) This, DeRamo argued, was impermissible character evidence under section 90.404(1). (Id. at 1594.)

In Kruse's response and at the hearing on the matter on August 15, 2007, Kruse argued that Orrs and Branch's testimony would be evidence involving

similar facts, presented to establish material facts at issue in this case under section 90.404(2), which provides that such evidence "is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." (R.Vol. 9, pp. 1787; Supp. R.Vol. 1, pp. 32-35.) Kruse argued that DeRamo's failure to prepare and maintain accurate records that would substantiate the construction cost was not mere sloppy bookkeeping, but was DeRamo's modus operandus and that Orrs and Branch would be able to testify to DeRamo's practice of failing to keep records, submitting no supporting documents, and then filing a lien for a higher amount than the purported final draw. (Supp. R.Vol. 1, pp. 33-34.)

The trial court granted DeRamo's Motion in Limine acknowledging that Orrs and Branch's testimony would be "offered to prove absence of mistake, intent, or plan on the part of DeRamo," but concluding that there has been "an insufficient showing of relevancy at this stage." (App. 4, pp. 2-4.)

**4. The Order Granting Summary Judgment in Favor of DeRamo on Kruse's Claim for Fraudulent Lien against DeRamo, individually.**

In the Order on Summary Judgment, the court cited to Checkers Drive-In Restaurants, Inc. v. Tampa Checkmate Food Services, Inc., 805 So. 2d 941, 944 (Fla. 2d DCA 2001) for the general proposition that "an officer/director of a corporation cannot be held personally liable for a corporation's action simply by

reason of his official relation to the corporation unless he or she personally participated in the fraud." (App 5, pp. 5-6.) The court concluded that there is no evidence establishing that DeRamo, individually, did anything to willfully exaggerate the amount of the lien, and the fact that DeRamo signed the liens as president of his company is insufficient to establish personal liability. (Id.)

## D. The Trial

### 1. The Operative Claims Relevant to This Appeal

At the jury trial, which commenced on September 17, 2007, DeRamo had two claims against Kruse: breach of contract (Count I) and construction lien foreclosure (Count II). (R. Vol. 1, pp. 52-54.)[4] Although DeRamo's Seconded Amended Claim of Lien was for the amount of $80,365.64, (Ex. 9), on the breach of contract count at trial, DeRamo sought $66,536.22 or, if the jury found that the $200,000.00 builder's fee contract the parties entered into on January 14, 2002 was invalid, $150,408.33. (Tr. 441-442.)

Kruse's counterclaims against DeRamo include the following:[5]

1. Fraud in the inducement against DeRamo, individually and corporately, for intending to discard or otherwise fail to maintain or prepare

[4] DeRamo's counts 2, 3 and 4 involved work performed on an unrelated matter and Kruse stipulated to those claims in advance of the trial.

[5] DeRamo successfully moved for summary judgment against Kruse's claims that DeRamo fraudulently diverted labor to other jobs and Kruse's claim for fraudulent lien against DeRamo individually, an issue in this appeal.

supporting documentation required to calculate the true cost of construction of the Kruse job. (R. Vol. 11, pp. 2157-2159.)

2. Breach of Contract against Homes By DeRamo, Inc. for (1) failure to calculate exact cost at the conclusion of the Kruse job; (2) failure to maintain accurate records; and (3) failure to pay taxes. (Id. at pp. 2161-2163.)

3. Fraudulent Lien against Homes By DeRamo, Inc. (Id. at 2164.)

**2. The Rulings at Trial**

**a. The Reputation Ruling**

On the first day of trial, DeRamo testified that Homes By DeRamo, Inc. has been a member of the Better Business Bureau for 22 years. (Tr. 262.) In response to a question about whether it had won any awards, DeRamo responded that he won a "20-year recognition from the Better Business Bureau for customer satisfaction after 20 years of no complaints." (Id.)

On cross-examination, Kruse renewed his objection to the Motion in Limine on the Orrs and Branch testimony. (Tr. 371.) Kruse sought permission from the court to inquire into other lawsuits against DeRamo, a complaint against DeRamo filed with the Construction Industry Licensing Board as well as complaint letter filed with the Better Business Bureau against DeRamo to rebut DeRamo's reputation testimony. (Tr. 513-520; see also 371-373.) The court, concluding that DeRamo's answer did not open the door to reputation evidence, allowed Kruse

only to elicit testimony about whether a complaint had been filed in the last 36 months with the Better Business Bureau, but not to inquire any further. (Tr. 517-520.)

**b. The Jury Instruction Ruling**

At the charging conference on the evening of September 20, 2007, when counsel and the court were reviewing the jury charge on the fraudulent lien claim under section 713.31, DeRamo argued for an instruction for an affirmative defense of good faith reliance on counsel's advice in preparing the claims of lien. (Tr. 1545-46.) DeRamo had concluded his case-on-chief the day before the charging conference. (TR. 935.) During his case-in-chief, DeRamo replied affirmatively to a line of questions from his counsel that DeRamo sought consultation with his attorney prior to filing the claims of lien, discussed with the attorney the Custom Dock situation, and that the liens were filed based on that consultation. (Tr. 436.) No other details of the alleged consultation were given. (Id.) Kruse argued that the evidence was insufficient for the defense instruction. (Tr. p. 1546.) The court was initially concerned that the jury had no idea what was discussed about Custom Dock between DeRamo and his counsel, but nevertheless allowed the instruction. (TR. 1546, 1549.) Kruse timely objected. (Tr. 1551.) The jury was charged with instructions on the defense of good faith reliance of counsel as follows:

> In determining whether Homes By DeRamo's claims of lien were fraudulent, you may consider whether Homes By DeRamo relied in good

> faith on the advice of counsel in preparing the claims of lien. In determining the intent of Homes By DeRamo and whether Homes By DeRamo acted in good faith, you may consider whether Homes By DeRamo sought the advice of counsel, and whether a full and complete disclosure of the pertinent facts was made to the attorney from whom the advice was sought before preparing and filing the claims of lien, and whether Homes By DeRamo could reasonably rely on such advice. (Tr. 1897-98.)

### c. Kruse's Motion in Limine Regarding Financial Status

In the Financial Worth Order, the court ruled that only if Kruse opened the door to issues involving payment of the draws may DeRamo present testimony regarding Kruse's financial status as it relates to Kruse's alleged inability to pay the final draw. (App. 3, p. 2.)

DeRamo was the first witness at trial and the first witness for his case. DeRamo testified that Kruse told DeRamo of specific financial problems Kruse was experiencing in January of 2002. (Tr. 455-56.) DeRamo testified that Kruse "owned stock in the stock market…[and]… had made big gains, or at least in my mind, millions of dollars of gains on it." (Tr. 456.) DeRamo testified that Kruse told DeRamo that when he sold the stock, he realized the gains, and incurred a tax liability. (Id.) Additionally, DeRamo testified that Kruse discussed with him the adverse effects the events of September 11, 2001 had on Kruse's stock values and retirement accounts. (Tr. p. 461.) DeRamo also testified that he could tell that Kruse was suffering financially because when Kruse moved into his new residence, he rented a U-Haul and moved himself. (Tr. 461-462.)

The landscaping subcontractor for the Kruse job called by DeRamo, Andy Chilton, testified also that he saw Kruse shortly after September 11, 2001 at "a bar" having "a martini," that Kruse seemed upset and, when asked, Kruse told him that he had lost money in the stock market after September 11, 2001. (Tr. 793-794.) Additionally, Tracey DeRamo, DeRamo's wife, testified in DeRamo's case-in-chief. In her testimony, she recalled that Kruse spent approximately $300,000.00 in furnishings for both the new residence and their condominium at the Ritz-Carlton, which they were furnishing at the same time. (Tr. 832-833.) Tracey DeRamo also testified that Kruse purchased two lots for approximately $200,000.00, the lot on which DeRamo constructed their residence for over one million dollars, and a condominium at the Ritz-Carlton for over a million dollars. (Tr. 835-841.)

**d. Kruse's Renewed Objection to DeRamo's Motion in Limine Regarding 1099s.**

Kruse's expert, certified public accountant Richard E. Goble (hereinafter, "Goble"), testified about auditing cost-plus construction contracts. (Tr. 1179-1182.) Goble summarized the auditing process, stating that normally an auditor has several hundred invoices, payments of payroll, and payments to subcontractors, and that the documents supporting these records should be readily available. (Tr. 1184.) Goble testified that DeRamo failed to maintain adequate records and cited as one example, the subcontracts that DeRamo had discarded. (Tr. 1187.) At that

point in Goble's testimony, counsel conferred with the court regarding what, if anything, could Goble testify to regarding the payroll records, given the court's 1099 Order. (Tr. 1187-1189.) The court indicated that there was to be no "insinuation regarding the 1099s or the classification." (Tr. 1189.)

Kruse renewed the objection to DeRamo's Motion in Limine regarding the 1099s and examined Goble for a proffer while the jury was out of the courtroom. (Tr. 1190.) Goble testified that he would normally expect to see records of payroll and W-2 IRS forms or, in the case of independent contractors, 1099s. (Tr. 1191.) In DeRamo's case, he was provided no records. (Id.) Not only did DeRamo's failure to maintain or prepare these records fall beneath the standard of record-keeping in the industry, but also Goble could not perform an audit of the labor without the records. (Tr. 1191-1192.)

Goble explained that auditors conduct what is called a "payroll tie" which is a standard audit step involving the total of the W-2 forms or 1099 forms to verify that labor charges were not duplicated or improperly allocated. (Tr. 1191-1192.) Absent the W-2 or 1099 forms, a labor audit would have been meaningless since Goble had no documents to coordinate the check totals against. (Tr. 1193-1194.)

After the proffer, the court informed Goble that there was an earlier ruling that the fact that there was no W-2 or 1099 forms were not admissible. (Tr. 1196.) Goble advised the court that the allocation of the payroll and inability to support

the allocation becomes difficult to discuss without mentioning the payroll tie. (Id.) Goble asked whether he could say that there is no documented support for the way the payroll was allocated. (Tr. 1197.) DeRamo's counsel suggested Kruse's expert merely state that "he could not verify the payments to the laborers." (Id.)

When the court inquired whether Goble could agree with the accuracy of the DeRamo's counsel's statement, Goble pointed out that one of the "very crucial issues" in the case is the payroll, and the "grossly inadequate" record-keeping as it related to the payroll. (Tr. 1198.) The court allowed Goble to use the word "payroll" but cautioned Goble against referring to W-2 or 1099 forms. (Tr. 1199.) Goble testified before the jury that "the documentation of the payroll was grossly inadequate." (Tr. 1200.)

## E. The Final Judgment

The jury returned a verdict in favor of DeRamo on DeRamo's claim and on Kruse's counterclaims and listed the balance owed by Kruse to DeRamo as $84,123.00. (R.Vol. 16, p. 3037.) The Final Judgment orders DeRamo to recover that amount plus prejudgment interest on DeRamo's breach of contract claim. (App. 1, p. 1.) The Final Judgment also granted DeRamo's construction lien foreclosure claim in the amount of $84,123.00. (Id. at 2.) The trial court denied Kruse's timely motions for remittitur and new trial. (R. Vol. 20, pp. 3905-3958, 3959-3960; 4005.)

## STANDARD OF REVIEW

The standard of review regarding the admissibility of evidence is whether there was an abuse of discretion. Crowe v. Lowe, 942 So. 2d 903, 905 (Fla. 4th DCA 2006). When ruling on evidentiary matters, a trial court's discretion is limited by the rules of evidence. Shaw v. Jain, 914 So. 2d 458, 460 (Fla. 1st DCA 2005). Likewise, the District Court of Appeal reviews discretionary issues involving the issuance of jury instructions for abuse of discretion. H & H Elec., Inc. v. Lopez, 967 So. 2d 345, 347 (Fla. 3d DCA 2007).

Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because even though there was competent substantial evidence to support a verdict, and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors may be such as to deny to defendant a fair and impartial trial. McDuffie v. State, 970 So. 2d 312, 328 (Fla. 2007). Although the points of error raised may present close questions on each individual issue, the cumulative impact of complained-of error at trial may mandate reversal. State Farm Mut. Auto. Ins. Co. v. Revuelta, 901 So. 2d 377 (Fla. 3d DCA 2005); Webb v. Priest, 413 So. 2d 43, 45 (Fla. 3d DCA 1982).

The appellate court must use an abuse of discretion standard to review a trial judge's refusal to grant a new trial or remittitur. Glabman v. De La Cruz, 954 So.

2d 60, 62 (Fla. 3d DCA 2007). Nevertheless, it is error for a court to allow a jury to award a greater amount of damages than what is reasonably supported by the evidence at trial. Rivard v. Gioia, 872 So. 2d 947 (Fla. 5th DCA 2004).

## SUMMARY OF THE ARGUMENT

The court's denial of Kruse's motions for new trial and remittitur were an abuse of discretion. The cumulative effect of the court's evidentiary rulings and jury instructions resulted in a fundamentally unfair trial. The trial court's 1099 Order deprived Kruse of his right to present his claim of breach of contract and fraudulent inducement as to DeRamo's duties to maintain accurate records and calculate the exact cost of construction under the Agreement. Kruse was also prevented from presenting evidence of the unreliability of DeRamo's calculation of the cost of construction and DeRamo's lack of credibility on the issue. The court's Net Worth Order was a misreading of the law and caused prejudice throughout the trial to Kruse. The court's pretrial ruling striking similar fact witnesses and the court's ruling on the refutation of DeRamo's reputation testimony misled the jury to think that DeRamo had no history of complaints.

The Final Judgment is contrary to the weight of the evidence since the judgment amount was not sought at trial and the judgment amount exceeded the amount listed in DeRamo's Second Amended Claim of Lien. Additionally, the jury's verdict regarding Kruse's Fraudulent Lien claim was against the manifest

weight of the evidence, especially with regard to the Custom Dock deposit. The trial court also erred when it granted summary judgment in DeRamo's favor on the fraudulent lien claim against DeRamo individually.

## ARGUMENT

### I. THE CUMULATIVE EFFECT OF ERRONEOUS DECISIONS ON THE MOTIONS IN LIMINE AND EVIDENTIARY RULINGS AT TRIAL RESULTED IN A FUNDAMENTALLY UNFAIR TRIAL, REQUIRING REVERSAL.

In this case, the rulings on the motions in limine and evidentiary rulings at trial were erroneous and the cumulative effect of the rulings on the motions in limine as well as the reputation evidence resulted in a fundamentally unfair trial. McDuffie v. State, 970 So. 2d 312, 328 (Fla. 2007).

#### A. The Trial Court Abused its Discretion When It Granted DeRamo's Motion in Limine Regarding the 1099s.

The 1099 Order cited to section 90.403, Fla. Stat. (2007), which governs exclusion on the grounds of prejudice or confusion and provides that "relevant evidence is inadmissible if its probative value is *substantially* outweighed by the danger of unfair prejudice…." (App. 2, p. 3 (emphasis in 1099 Order).) The 1099 Order also cites to Professor Ehrhardt for the proposition that section 90.403 does not bar prejudicial or damaging evidence, but only evidence "which is directed to an improper purpose, such as evidence that inflames the jury or appeals improperly to the jury's emotions; or that an accused committed the charged crime because of

evidence of the bad or evil character of the accused." (Id.) Professor Ehrhardt makes it clear that section 90.403 does not apply to evidence such as DeRamo's failure to file 1099s. To illustrate, the above principle, Professor Ehrhardt states:

> Among the specific factual situations in which the Florida courts have applied section 90.403 are testimony that an accused was arrested in a high crime area, testimony concerning the results of blood alcohol tests, testimony concerning the general behavior of drug dealers, testimony concerning racial or ethnic slurs, evidence of traffic citations, evidence of a party's financial status, prior official actions, evidence of drug use, and evidence of the criminal history of a party to a civil action.

See Florida Evidence § 403.1 (2008 ed.)(internal footnote references omitted). DeRamo's breach of his own Agreement does not rise to the prejudicial level of the examples listed above by Professor Ehrhardt.

In this case, the Court was persuaded in favor of DeRamo because, even though counsel stipulated that DeRamo's failure to file the 1099s was a technical breach of the Agreement, the Court agreed with DeRamo that Kruse suffered no damage as a result of this breach by DeRamo. This conclusion is erroneous and resulted in an unfair trial.

**1. Evidence of a Breach of Contract is Relevant to a Trial involving a Breach of Contract**.

Under a cost-plus contract, the amount paid by DeRamo for goods and services is critical in determining the amount, if any, owed by Kruse, both as the job progressed and at completion. See Sharrard v. Ligon, 892 So. 2d 1092, 1094

(Fla. 2d DCA 2004) (citing to Persinger v. Estate of Tibbetts, 727 So.2d 350 (Fla. 5th DCA 1999). Accordingly, "accurate record keeping and accounting for costs by the Contractor [is] essential to the proper administration of the parties' cost-plus contract." Id. at 1094-95.

Both parties in this case alleged breach of the parties' January 9, 2000 Agreement. DeRamo alleged that Kruse failed to make the final payment under the Agreement, and Kruse alleged that DeRamo could not exactly calculate the cost of construction under the Agreement because DeRamo had not, among other things, maintained accurate records, and that, under the Agreement, DeRamo had an affirmative duty to pay taxes and comply with all laws. (Ex. 1: Art. V.(5) and (6).) Accordingly, DeRamo's failure to file 1099s on his laborers, or maintain any other required tax records, was more than a technical breach; it provided the basis of Kruse's defense and the gravamen of Kruse's counterclaim that DeRamo failed to calculate the exact cost of construction and could not substantiate the cost of the labor.

**2. The Labor Cost was the Gravamen of Kruse's Counterclaim.**

In Kruse's counterclaim, Kruse alleged that DeRamo deliberately concealed the true cost of the labor charged to him for the Kruse job by failing to maintain accurate records of the hours worked by the laborers and the payments made. The copies of the labor checks and single-entry handwritten journal DeRamo produced

to allegedly support the labor cost were so grossly inadequate that Kruse's expert could reach no conclusion about the propriety of the labor cost. (Tr. 1200-03.) DeRamo's failure to prepare tax records resulted in Kruse's inability to contact many of the laborers for discovery purposes, another fact that the trial court excluded in the 1099 Order. (App. 2, p. 4.)

Moreover, DeRamo's failure to prepare tax records coupled with DeRamo's admission that he discarded subcontracts resulted in Kruse's inability to determine how much labor DeRamo paid for versus the labor embedded in the subcontracts. Kruse's expert, Hank Gerkin, testified that based on the plans, the labor cost should have totaled no more than $126,000.00, rather than the $276,109.00 claimed by DeRamo. (Tr. 974-75; 981-82; Ex. P.)

### 3. The Court's 1099 Order Prevented Kruse's Expert from Presenting Crucial Testimony

Kruse's expert, Goble, was hired to testify, inter alia, about the audit he conducted on construction of the Kruse job. Goble was unable to testify that an auditor analyzing a construction job would normally expect to see payroll records and tax records. (Tr. 1191-94.) In this case there were none, even though the law and the Agreement required DeRamo to prepare and maintain these records. (See Sharrard v. Ligon, *supra*; Ex 1.) The absence of the records prevented Goble from conducting a "payroll tie" which correlates the checks and ledger entries to ultimate documentation prepared in connection with payroll. (Tr. 1198.) Goble's

inability to conduct a payroll tie rendered DeRamo's labor charges unverifiable, but the jury was not allowed to receive this testimony.

Furthermore, the 1099 Order resulted in the trial court parsing the testimony of Kruse's expert. Goble testified on proffer that he was unable to conduct a proper audit of the payroll because he could not do a payroll tie. Goble could not do a payroll tie because DeRamo produced no payroll tax records. But Goble was forbidden from mentioning that the lack of tax records precluded a payroll tie, which in turn prevented a meaningful audit of the payroll. (Tr. 1197-98.) Instead, the court instructed Goble that what he could say on the above was simply that DeRamo's payroll documentation was grossly inadequate, (Tr. 1196-1199, 1200), literally putting words in Goble's mouth and completely diluting the impact of his testimony.

The jury could have reached an adverse inference about DeRamo's decision to violate both the law and the Agreement by failing to maintain records that would have rendered the alleged labor charges auditable. The jury undoubtedly went into deliberations thinking that DeRamo had complied with the Agreement and the law because Kruse had not adduced testimony to the contrary. Thus, all the negative inferences that flowed from this breach of the contractor's duty by DeRamo were lost. This alone resulted in a fundamentally unfair trial.

### 4. The Court's 1099 Order Prevented Kruse from Presenting Critical Evidence Regarding DeRamo's Credibility.

Despite intimations in the depositions of DeRamo and his secretary, Elaine Enoch, that 1099s existed for DeRamo's laborers, DeRamo finally admitted after five years that DeRamo prepared no 1099s for his laborers. (App. 6, p. 2-3, 4.) Not once in the five years Kruse had been seeking the 1099s through Requests for Production and Interrogatories, not once in the responses to Kruse's two motions to compel seeking the 1099s, not once during the two hearings on Kruse's motions to compel, and not once in the exception DeRamo filed or during the hearing on the exception, did DeRamo or his counsel ever indicate to Kruse or to the court that the documents at issue did not exist. (Id. at 4.) In order to avoid disclosing this breach of the Agreement to Kruse, DeRamo simply intimated that he had filed the 1099s, but that Kruse was not entitled to copies of the 1099s, despite the relevant information contained therein. DeRamo was sanctioned for this discovery abuse and Kruse was awarded $12,553.64 in attorney's fees. (R. Vol. 16, pp. 3050-53.)

Notwithstanding the sanction order, the 1099 Order prevented any mention of DeRamo's testimony showing his deliberate concealment of records that were relevant to the cost of construction, the primary issue in the case. The 1099 Order kept out crucial evidence of DeRamo's lack of credibility, which is always relevant at a trial. Mendez v. State, 412 So. 2d 965, 966 (Fla. 2d DCA 1982).

### B. The Trial Court Abused its Discretion When It Denied Kruse's Motion in Limine Regarding Kruse's Financial Status.

In the Financial Worth Order, the court ruled that evidence of Kruse's financial status or net worth is relevant to DeRamo's theory that Kruse was financially unable to pay the final draw. The court concluded that if Kruse "'opens the door' to issues involving the payment of the draws", DeRamo could elicit testimony regarding Kruse's financial status to present an alternate theory of why Kruse did not pay the final draw. (App. 3, p. 2.)

This was error and resulted in effectively allowing a net worth comparison, and allowing the introduction of totally irrelevant and immaterial issues into the trial. This decision alone resulted in extreme prejudice to Kruse.

In the Financial Worth Order, the court relied on Sossa By and Through Sossa v. Newman, 647 So. 2d 1018 (Fla. 4th DCA 1994). In Sossa, defendants "repeatedly stressed" that the plaintiff had not sought additional medical care in order to argue that plaintiff had not been injured. Id. at 1020. The Sossa court acknowledged that the general rule in Florida is that "no reference should be made to the wealth or poverty of a party, nor should the financial status of one party be contrasted with the other's." Id. at 1019. The Sossa court went on to rule that because defendants opened the door and cast doubt on the extent of plaintiff's injuries, the plaintiff should be permitted to adduce evidence that the reason further

medical treatment was not sought was because the plaintiff could not afford such further medical treatment. Id. at 1020.

The facts in the instant case are completely different. In this case, DeRamo offered his alternate theory of Kruse's non-payment in order to present the normally prejudicial evidence of a party's wealth.[6] Under the court's rationale, any time there is a dispute about payment in a commercial transaction, a plaintiff alleging breach by nonpayment can claim that the defendant failed to pay because the defendant did not have the financial ability to pay (or had too much money, as the case may be). In the court below, that claim would be sufficient to contravene the general law that no reference shall be made about the financial status of the parties, and allow the plaintiff to introduce evidence of financial worth. This would lead to every commercial case becoming a speculative activity, resulting in the jury hearing irrelevant evidence about a party's business life, personal life, and spending habits, as was adduced in the instant case.

As the Sossa court noted, "[t]he reason the courts are so adamant about this rule is that jurors have a tendency to favor the poor as against the rich and, if provoked by such inflammatory evidence, the jury is likely to apply the deep pocket theory of liability." Sossa, 647 So. 2d at 1019-1020.

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[6] The court's reference to Kruse opening the door to issues involving the payment of draws is not any limitation at all since DeRamo's case-in-chief was Kruse's failure to pay the final draw.

In the instant case, the jury heard testimony about Kruse's alleged losses in the stock market (Tr. 461; 793-94); the jury heard testimony that Kruse purchased furnishings in the approximate amount of $300,000.00 (Tr. 832-33); the jury heard testimony that Kruse allegedly incurred tax liabilities because of "millions of dollars" in stock gains (Tr. 456); the jury heard testimony of other real estate purchases made by Kruse, including a condominium at the Ritz-Carlton (Tr. 832-33; 835-841); and the jury heard testimony that Kruse performed their own moving because they allegedly did not have funds to hire a mover, among other things (Tr. 461-62). The foregoing testimony was completely irrelevant to the claims at issue and the testimony was highly prejudicial to Kruse. The court's ruling on Kruse's Motion in Limine which allowed this testimony at trial about Kruse's financial status resulted in a fundamentally unfair trial to Kruse.

### C. The Trial Court Abused its Discretion When It Denied Kruse the Opportunity to Refute DeRamo's Testimony Regarding his Reputation and Similar Fact Evidence under Sec. 90.404(2)(a).

It was error to allow DeRamo to introduce evidence of his reputation, but not allow rebuttal evidence of that reputation. Specifically, DeRamo testified that he had not had a complaint from the Better Business Bureau for 20 years and had won an award for that. (Tr. 262.) The court limited the reputation rebuttal evidence to one question concerning a recent complaint filed with the Better Business Bureau. (Tr. 518-20.) DeRamo had several lawsuits, including a pending

lawsuit in the same circuit, which was set for trial, with a similar counterclaim for fraudulent lien. (R. Vol. 20, p. 3906.) DeRamo had been sued at least twice in the past, and testified in deposition that a complaint had been filed with the construction industry licensing board about his company, and that he had received a letter of reprimand. (Tr. 519.)

Moreover, Kruse sought to present testimony from Orrs and Branch, two other customers of DeRamo's who would have testified that their experience was similar to Kruse's: they received no documents supporting the cost of construction and when they did not pay the final draw immediately, DeRamo filed a lien for a higher amount than the purported final draw amount. DeRamo admitted to mistakes in his claims of lien, his records, and charges rendered to Kruse, but insisted these mistakes were simple computational errors. (Tr.579.) The testimony of Orrs and Branch would have been offered under sec. 90.404, Fla. Stat. to prove absence of mistake, intent or plan on the part of DeRamo to use the lien process, or threaten to use the lien process, to collect extra money at the conclusion of a job, and other matters which show absence of mistake, intent or plan.

The failure to allow introduction of this evidence allowed DeRamo's evidence of reputation to go unrebutted, resulting in the jury believing that DeRamo had a spotless record, with no administrative or judicial complaints filed, which was not the case. This ruling, in conjunction with the Court's pre-trial order

granting DeRamo's Motion in Limine Striking Kruse's Witnesses, prevented the jury from hearing evidence that not only has DeRamo received judicial, administrative and informal complaints, but the nature of some complaints involved similar facts and would tend to show that DeRamo's failure to calculate the exact cost of construction and failure to maintain records as well as DeRamo's exaggeration of the liens were not good faith mistakes or just sloppy bookkeeping, but a pattern of practice or modus operandus for DeRamo. This was error and resulted in prejudice to Kruse.

## II. THE COURT ABUSED ITS DISCRETION WHEN IT DENIED KRUSE'S MOTION FOR A NEW TRIAL OR, ALTERNATIVELY, MOTION FOR REMITTITUR.

### A. The Jury's Verdict on the Amount of Damages Was Against the Manifest Weight of the Evidence and Should be Reversed.

The jury was instructed that if they found for DeRamo, they should award DeRamo damages, which was defined as "any additional amounts of money due to" DeRamo from Kruse under the Agreement. (Tr. 1883-84.) The evidence at trial showed that DeRamo's Seconded Amended Claim of Lien was for the amount of $80,365.64. (Ex. 9, TR. 590-91.) On the breach of contract count, DeRamo testified that the amounts still due from Kruse was either $66,536.22, or, if the jury found that the $200,000.00 builder's fee contract the parties entered into on January 14, 2002 was invalid, $150,408.33. (Tr. 441-42.) The jury, finding in favor of DeRamo, calculated that Kruse owed DeRamo the amount of $84,123.00.

The Final Judgment reflects this amount in both the breach of contract count and the lien foreclosure count. The court abused its discretion when it denied Kruse's Motion for a New Trial or, in the alternative, Motion for Remittitur, on that basis.

A judgment on a lien foreclosure cannot be for an amount that exceeds the amount in the claim of lien. When the measure of damages upon a breach is fixed, a jury is not at liberty, as in an unliquidated situation, to pick a figure, but is required to conform to the court's instructions. Middelthon v. Crowder, 563 So. 2d 94 (Fla. 3d DCA 1990). A court cannot allow a jury to award a greater amount of damages than what is reasonably supported by the evidence at trial. Rivard v. Gioia, 872 So. 2d 947 (Fla. 5th DCA 2004). If the jury verdict is excessive, remittitur is an appropriate remedy. Id.

In the instant case the verdict was not only contrary to law, but also was clearly contrary to the evidence. Concept, L.C. v. Gesten, 662 So. 2d 970, 974 (Fla. 4th DCA 1995); Dunn v. Van Ostenbridge & Sons, Inc., 466 So. 2d 429, 430 (Fla. 2d DCA 1985). Denying Kruse's Motion for Remittitur was an abuse of discretion.

The amount reached by the jury was not a compromised amount either. In cases where the amount reached by the jury is clearly inadequate but liability was hotly contested, the amount of damages can be regarded as a "compromised" verdict. See e.g. Street v. H.R. Mortg. & Realty Co., 949 So. 2d 1158, 1161 (Fla.

4th DCA 2007). In this case, the amount awarded does not split the difference, nor does it conform to any other plausible reading of the evidence adduced.

The verdict does not split the difference between the two amounts sought by DeRamo and it exceeds the amount in DeRamo's Second Amended Claim of Lien. Since the amount of damages was not reasonably supported by the evidence at trial, denying a motion for remittitur was in error. See McCarthy Bros. Co. v. Tilbury Const., Inc., 849 So. 2d 7 (Fla. 1st DCA 2003); Schimpf v. Reger, 691 So. 2d 579 (Fla. 2d DCA 1997); Carrousel Intern. Corp. v. Auction Co. of America, Inc., 674 So. 2d 162 (Fla. 3d DCA 1996); Kish v. McDonald's Corp., 564 So. 2d 1177 (Fla. 4th DCA 1990).

As in the above cases illustrate, although a jury is accorded wide latitude in determining an amount of non-economic damages, see e.g. Rety v. Green, 546 So. 2d 410 (Fla. 3d DCA 1989), the amount of economic damages must be supported by evidence adduced at trial. In the instant case, the jury verdict of $84,123.00 was not supported by *any* evidence at trial. The jury misapprehended the instructions or misapprehended the evidence. Accordingly, the denial of Kruse's motion for a new trial or, in the alternative, motion for remittitur is erroneous and should be reversed.

### B. The Jury's Verdict on Kruse's Fraudulent Lien Claim was Against the Manifest Weight of the Evidence and Should be Reversed.

A finding of a fraudulent lien by a trial court is not a discretionary matter: as a contested issue, the lienor's intent and good or bad faith in filing a lien must be based on competent substantial evidence in the record. Delta Painting, Inc. v. Baumann, 710 So. 2d 663, 664 (Fla. 3d DCA 1998). In the instant case, the finding that DeRamo's lien was not fraudulent had no basis in competent substantial evidence and should be reversed. Sharrard v. Ligon, 892 So. 2d 1092, 1098 (Fla. 2d DCA 2004).

Section 713.31, Fla. Stat. provides that a lien is fraudulent if (1) the lienor has willfully exaggerated the amount for which such lien is claimed; (2) the lienor has willfully included a claim for work not performed upon or materials not furnished for the subject property; or (3) the lienor has compiled his claim with such willful and gross negligence as to amount to a willful exaggeration. Section 713.31(2)(a), Fla. Stat. (2006). DeRamo not only compiled his claim of lien with willful and gross negligence, but he also willfully exaggerated the amount due and included amounts for work not performed and materials not furnished for the Kruse job.

The clearest example of the latter is the $4,242.00 deposit to Custom Dock that DeRamo included in all three claims of lien, filed on April 19, June 20 and

June 25, 2002. (Tr. 590-91.) The jury heard testimony from Ms. Koenreich from Custom Dock that on April 22, 2002, when Kruse and Custom Dock entered into a separate contract, DeRamo was entitled to his full deposit of $4,241.00 back. (Tr. 1148; 1158.) Ms. Koenreich testified that no work was performed and no materials were delivered to the Kruse job by Custom Dock. (Tr. 1147; 1157-58.) Yet DeRamo included his $4,241.00 deposit with Custom Dock on all three claims of lien. As such, DeRamo willfully included a claim for work not performed upon or materials not furnished for the Kruse job, on this issue alone.

The purpose for which the mechanic's lien law was framed is to ensure that a contractor receives payment for his work. Scott v. Rolling Hills Place Inc., 688 So. 2d 937, 939 (Fla. 5th DCA 1996). DeRamo admitted that the purpose of the lien was to collect monies owed to him by Kruse, and he acknowledged that Custom Dock was to refund the $4,241.00 deposit back to him, not Kruse. (Tr. 585-86.) DeRamo's deliberate inclusion of the Custom Dock deposit in all three of his liens against Kruse was a willful exaggeration of the amount of the lien and was thus fraudulent, as a matter of law. See Sharrard v. Ligon, 892 So. 2d 1092, 1098 (Fla. 2d DCA 2004).

The evidence also showed that DeRamo compiled his claim with such willful and gross negligence as to amount to a willful exaggeration. DeRamo's Second Amended Claim of Lien was for the amount of $80,365.64. During the

five years between the Second Amended Claim of Lien and the date of trial, Kruse found various discrepancies, overcharges and wrongful charges. DeRamo eventually reduced the amount he sought from Kruse from $80,365.64 to $66,536.22 at trial, which represents more than a 15% difference. See Sharrard v. Ligon, 892 So. 2d at 1098 (finding that the inclusion of unauthorized expenses amounted to 14% of the lien amount and was thus not a "minor error" within the meaning of sec. 713.31(2)(b). DeRamo also included $6,735.00 from Central Systems when Kruse could not find the charge in DeRamo's ledger. (Tr. 593-94; 1595.) The charge was later found in DeRamo's ledger but DeRamo had already increased the lien, without reviewing his ledgers and without further inquiry. (Id.) Including an additional amount of nearly $14,000.00 on the lien, for which Kruse was not responsible, in compiling his lien was willful and gross negligence as to amount to a willful exaggeration, as a matter of law.

The above evidence of DeRamo's inclusion of the Custom Dock deposit and Central Systems charge reveal DeRamo's lack of good faith in compiling his liens. Sharrard v. Ligon, *supra*, a recent fraudulent lien case decided by this Court, is instructive. As in the instant case, Sharrard involved a cost-plus construction contract, a complaint for, *inter alia*, breach of contract and lien foreclosure and a counterclaim for, *inter alia*, breach of contract and fraudulent lien. Id. at 1095. After the seven day bench trial, the judge found that the Ligons owed the

contractor, Sharrard, only $70,500.00, in contrast to the $158,843.62 Sharrard claimed on his claim of lien. Id. But the trial court found that the lien was not fraudulent based primarily on the court's finding that Sharrard's lien amount "was based, at least in part, upon the advice of counsel." Id. at 1096. This Court reversed the trial court's finding that the lien was not fraudulent based on Sharrard's inclusion in his lien premiums for worker's compensation coverage that Sharrard did not carry for the Ligon job. Id.

Although Sharrard testified at trial that he sought the advice of counsel before compiling his lien, this Court rejected the safe harbor of good faith reliance on counsel because the evidence showed that Sharrard's counsel relied on Sharrard's representations that he had the coverage in question. Id. at 1097. Sharrard also testified that he included those amounts under the mistaken belief that he had worker's compensation coverage and that his mistake was a minor error. Id. at 1098-1099. This argument was also rejected by this Court who observed that the "Contractor's bare assertion that he acted in good faith was an unsupported legal conclusion, not evidence." Id. at 1099. This Court twice noted that Sharrard failed to make "appropriate inquiry" about whether he had indeed been paying for coverage before so representing, either to his counsel or in the lien. Id. at 1098. Also noted by the Court was that Sharrard's wrongful charges for coverage premiums amounted to 14% of the total lien claim, which was not

regarded by this Court as a "minor mistake" under section 713.31(2)(b). This Court concluded that Sharrard padded his expenses to inflate the amount of the lien, and accordingly, the lien was fraudulent as a matter of law, notwithstanding the trier-of-fact's determination that Sharrard lacked the requisite intent. Id. at 1099.

In the instant case, it is uncontroverted that DeRamo padded his expenses to inflate the lien. Unlike Sharrard, DeRamo did not even allege that he was under a mistaken belief that Kruse owed him $4,241.00 for the deposit to Custom Dock. DeRamo understood the $4,241.00 deposit would be returned to him from Custom Dock. (Tr. 585-86.) At trial, DeRamo insisted that the deposit was included on all three liens because it was an expense and he had not received the refund yet. (Tr. 590.) An appropriate inquiry by DeRamo to Custom Dock would have confirmed that he was due the full amount of the deposit and that no work had even been performed. (Tr. 1147, 1148.) This lack of inquiry on DeRamo's part cannot constitute good faith, notwithstanding the jury's verdict.

Including amounts for non-lienable charges, charges previously paid for, or unauthorized or arbitrary charges on claims of lien in order to pad the amount of the lien renders the claim of lien fraudulent. Onionskin, Inc. v. DeCiccio, 720 So. 2d 257 (Fla. 5th DCA 1998); Viyella Co. v. Gomes, 657 So. 2d 83 (Fla. 3d DCA 1995); Martin v. Jack Yanks Const. Co., 650 So. 2d 120 (Fla. 3d DCA 1995). Evidence that a contractor knowingly included charges for work not performed or

materials not furnished is "wholly inconsistent with any notion of a minor mistake or good faith dispute between the parties". Delta Painting, Inc. v. Baumann, 710 So. 2d 663, 664 (Fla. 3d DCA 1998). A final judgment that a lien is not fraudulent will be reversed if the lien amounts contain non-recoverable, unauthorized or arbitrary amounts and good faith is not supported by the record. See Sharrard, *supra*; Ponce Inv. Inc. v. Financial Capital of America, 718 So. 2d 280, 282 (Fla. 3d DCA 1998); Skidmore, Owings and Merrill v. Volpe Const. Co., Inc., 511 So. 2d 642 (Fla. 3d DCA 1987).

By including the $4,241.00 deposit, DeRamo's lien contains an amount for work never performed and materials never furnished to Kruse's property. Moreover, DeRamo knew when he filed the claims of lien that Kruse was not responsible for the payment (or, in this case, return of deposit) of the $4,241.00 amount. Accordingly, DeRamo's claim of lien in this case is fraudulent, as a matter of law, and judgment should be entered in favor of Kruse on the fraudulent lien claim.

## III. IT WAS ERROR FOR THE COURT TO INSTRUCT THE JURY ON THE GOOD FAITH RELIANCE ON COUNSEL DEFENSE UNDER SECTION 713.31.

During DeRamo's case-in-chief, DeRamo testified that, prior to filing the liens against Kruse, DeRamo consulted with counsel, discussed the situation with the deposit of $4,241.00 with Custom Dock, and based on that consultation the

liens were filed. (Tr. 436.) Kruse objected, and the court overruled the objection. Subsequent thereto, DeRamo rested. (Tr. 935.) At the charging conference thereafter, the trial judge permitted DeRamo's counsel's instruction on reliance on counsel as a defense to a fraudulent lien over objection by Kruse. (Tr. 1545-1551.)

It is fundamental that a charge to a jury should be predicated upon the evidence adduced at the trial and the reasonable inferences arising therefrom. Parker v. Chew, 280 So. 2d 695, 697 (Fla. 2d DCA 1973). Instructions must be predicated upon facts in proof, and a charge on an issue as to which evidence has not been submitted will constitute error. Bessett v. Hackett, 66 So.2d 694, 698 (Fla. 1953). The test for reversible error arising from an erroneous jury instruction is not whether the instruction misled, but only whether it reasonably might have misled the jury. McPhee v. Paul Revere Life Ins. Co., 883 So.2d 364, 368 (Fla. 4th DCA 2004). In this case, DeRamo did not adduce sufficient evidence to warrant an instruction of the good faith reliance on counsel to avoid liability for a fraudulent lien.

The defense of reliance on advice of counsel is not a statutory defense. As this Court acknowledged in Sharrard v. Ligon, 892 So. 2d 1092 (Fla. 2d DCA 2004), a lienor's consultation with counsel tends to establish that the lienor acted in good faith. Id. at 1097. Accordingly, "in determining whether a lienor has willfully exaggerated the amount stated to be due in a claim of lien, the lienor's

consultation with independent counsel prior to filing the claim of lien is a factor to be considered along with other pertinent factors." Id.

The Second District Court of Appeal has looked at the defense for fraudulent lien in Sharrard and in William Dorsky Associates, Inc. v. Highlands County Title and Guar. Land Co., 528 So. 2d 411 (Fla. 2d DCA 1988). In Dorsky, Dorsky was the architect whose fees were payable as phases of the project were completed. Appellees terminated the services of Dorsky, who filed a claim of lien based on the percentage owed after the completion of the "design development" phase. Id. at 412. The appellees contended that Dorsky was terminated in the "schematic design" phase. Id. The trial court agreed with appellees and also found that Dorsky's claim of lien was fraudulent. Id.

This Court reversed the trial court's decision that Dorsky's lien was fraudulent, finding persuasive that when appellees refused to honor Dorsky's bill following Dorsky's termination, Dorsky consulted with an attorney who (1) examined Dorsky's documentation; (2) determined Dorsky claim for the design development phase termination had been reached in good faith; (3) calculated the amount that Dorsky could assert; and (4) prepared and filed the lien for Dorsky. Id. at 412. Under those facts, this court noted that in analyzing whether Dorsky willfully exaggerated the amount, "we cannot overlook the fact that Dorsky filed its claim after consultation with independent counsel." Id.

By contrast, in Sharrard, this Court found that despite his consultation with counsel, Sharrard's consultation does not militate in favor of Sharrard's good faith. In reaching that conclusion, this Court analyzed the testimony of the attorney who participated in the preparation of Sharrard's amended claim of lien about the discussion during the initial meeting with Sharrard, including the advice and warnings the attorney gave to Sharrard, and Sharrard's representations regarding the coverage. Id. at 1097. Under those circumstances, this Court concluded that Sharrard's consultation with counsel is not entitled to weight with respect to good faith since Sharrard failed to disclose pertinent facts. Id.

In the instant case, the jury heard no evidence beyond DeRamo's bare assertions that he spoke with counsel and discussed the Custom Dock situation and after that, filed the lien. Unlike Dorsky, there was no testimony adduced regarding the nature and extent of those discussions. Unlike Sharrard, DeRamo's counsel did not testify about DeRamo's representations. If a mere representation that a lienor discussed a questionable charge with a lawyer before filing a claim was sufficient to avoid liability, all lienors would so testify as a matter of course in all actions brought under section 713.31. Because a trial court cannot give a particular jury instruction on an issue unless material record evidence supports that instruction, Carmona v. Carrion, 779 So.2d 337, 339 (Fla. 2d DCA 2000), this jury instruction was in error.

## IV. IT WAS ERROR FOR THE COURT TO GRANT SUMMARY JUDGMENT IN FAVOR OF DERAMO ON KRUSE'S CLAIM FOR FRAUDULENT LIEN AGAINST DERAMO, INDIVIDUALLY.

In the Order on Summary Judgment, the court correctly noted that an officer or director of a corporation cannot be held personally liable for a corporation's action simply by reason of his official relation to the corporation unless he or she personally participated in the fraud. (App. 5, p. 6.) Citing to Havatampa Corp. v. Walton Drug Co., Inc., 354 So. 2d 1235 (Fla. 2d DCA 1978), the court went on to conclude that DeRamo cannot be held personally liable for a fraudulent lien since he signed all three claims of lien in his official capacity as president of Homes By DeRamo, Inc. (Id.) This is an erroneous interpretation of the law.

Havatampa Corp. v. Walton Drug Co., Inc., 354 So.2d 1235 (Fla. 2d DCA 1978) was a case involving individual liability on a promissory note. The decision turned on the court's interpretation of the now-repealed sec. 673.403, Fla. Stat. which relieved signors of individual liability if certain signing formalities were met. Havatampa Corp., 354 So. 2d at 1236. Contrary to the trial court's ruling, DeRamo's signing of the claims of lien in his representative capacity does not absolve DeRamo of personal liability for tortious acts he committed.

The general rule is that "[i]ndividual officers and agents of a corporation are personally liable where they have committed a tort *even if* such acts are performed within the scope of their employment or as corporate officers or agents."

McElveen By and Through McElveen v. Peeler, 544 So. 2d 270, 271 (Fla. 1st DCA 1989) (emphasis added). If a director or officer himself commits or participates in the commission of a tort, even if also committed by the corporation, the officer or director is personally liable for that tort. Home Loan Corp. v. Aza, 930 So. 2d 814, 815-816 (Fla. 3d DCA 2006).

DeRamo, as an individual officer or agent of Homes By DeRamo, Inc. compiled all of the claims of lien and calculated the amount due to Homes By DeRamo, Inc. from Kruse himself. Accordingly, the jury could have reasonably concluded that DeRamo, personally, was liable for filing the fraudulent lien. See Estate of Canavan v. National Healthcare Corp., 889 So. 2d 825, 827 (Fla. 2d DCA 2004).

The fact that DeRamo compiled the claims of lien and signed them in his representative capacity would not shield DeRamo if he willfully exaggerated the amounts due under the lien. Checkers Drive-In Restaurants, Inc. v. Tampa Checkmate Food Services, Inc. , 805 So. 2d 941 (Fla. 2d DCA 2001). Moreover, it is well-settled that a corporate director, acting as a representative of his corporation, can be held personally liable for fraud. Wadlington v. Continental Medical Services, Inc., 907 So.2d 631 (Fla. 4th DCA 2005). Therefore, if DeRamo had personal knowledge that the lien was fraudulent, he cannot hide behind a

corporate veil. The jury should have been afforded the opportunity to rule on this point.

## CONCLUSION

For the foregoing reasons, the appellants request that this court:

1) Reverse the trial court's denial of their Motion for a New Trial based on the prejudicial cumulative effect of the trial court's rulings pre-trial and rulings during trial or that the verdict was against the manifest weight of the evidence; or

2) Reverse the trial court's denial of their motion for remittitur on the ground that the verdict was in excess of the amount sought by DeRamo at trial;

3) Remand for an entry of judgment in favor of Kruse against DeRamo on the fraudulent lien count;

4) In the alternative, remand for a reduction in the foreclosure judgment to the lien amount; and

5) Grant such other and further relief as the court deems just and proper under the circumstances.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by regular U.S. Mail to Dana J. Watts, Esquire, 1620 Main Street, Suite One, Sarasota, FL 34236, on this 25th day of July, 2008.

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief is submitted in Times New Roman 14-point font, which satisfies the requirements of Florida Rules of Appellate Procedure 9.100(l) and 9.210(a)(9)(2).

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