No. 2—10—0156
Order filed March 10, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROBERT KASINECZ, d/b/a R.K. ENTERPRISES, Plaintiff-Appellant,	Appeal from the Circuit Court of Du Page County.
v.	No. 05—CH—614
JOSEPH DUFFY, NATIONAL CITY MORTGAGE d/b/a COMMONWEALTH UNITED MORTGAGE CO., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS), HOMECOMING FINANCIAL, DOWNERS GROVE SANITARY DISTRICT, and UNKNOWN OWNERS, TRUSTEES, LENDERS, AND LIEN CLAIMANTS, Defendants-Appellees	
(National City Mortgage, Third-Party Plaintiff; Elite Financial Investments, Inc., Third-Party Defendant).	Honorable Bonnie M. Wheaton, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Bowman and Birkett concurred in the judgment.

ORDER

Held: Where homeowner did not expressly request that contractor provide a sworn statement pursuant to section 5 of the Lien Act, and suffered no prejudice from the

> lack of a sworn statement, contractor's failure to provide sworn statement did not bar him from proceeding on his claims for mechanic's lien and breach of contract.

The plaintiff, Robert Kasinecz, was a general contractor who performed work for the defendant homeowner, Joseph Duffy. The planned home was not completed and Kasinecz sued Duffy (along with other potential lienholders), asserting a right to foreclose on his mechanic's lien and raising alternative claims sounding in breach of contract, *quantum meruit*, unjust enrichment, and fraud. The case went to trial, and following the presentation of Kasinecz's case in chief, the trial court granted a motion for a directed finding in favor of the defendants, based on the argument that Kasinecz could not maintain his claims for mechanic's lien or breach of contract because he had failed to give Duffy a sworn contractor's statement. After the resolution of various other pending matters, Kasinecz filed this appeal. We reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are taken from the testimony at trial, most of which was presented in Kasinecz's case in chief. Kasinecz and Duffy were introduced during the spring of 2004 through Kasinecz's sister, Marie Kasinecz, who worked for Duffy. According to Marie, Duffy had indicated that he was interested in investing in real estate and she showed him several properties before eventually mentioning a house that was for sale at 4500 Bryan Place in Downers Grove. Duffy was interested in buying and rehabbing the house for a quick sale. Marie introduced him to Kasinecz, who had been a contractor for over 20 years.

The parties agree that they reached an oral agreement on April 10, 2004, but differ on the content of that agreement. According to Kasinecz, Duffy wanted to demolish the current house and build a new one, and then sell it for profit. Kasinecz prepared some sketches of homes that could be built on the property. Kasinecz testified that he and Duffy agreed that Duffy would acquire the property and Kasinecz would demolish the old house and build a new one similar to the sketches for $477,000, and Duffy would then sell the home for a profit. Duffy's account differed greatly. He testified that he and Kasinecz agreed to enter into a partnership under which they would acquire the property and build a new home, but they would split all the costs as they arose (including the mortgage and construction costs) and then split the profits as well. According to Duffy, he agreed to buy the property and obtain a mortgage on it under his name alone because Kasinecz had poor credit due to a prior bankruptcy. However, Kasinecz was still supposed to split the costs of the project with him. Duffy entered into a sale contract on the property on April 12, 2004, and closed on it (subject to a mortgage) on May 27, 2004. Kasinecz testified that, during this time, he did initial work to get blueprints from architect Brock Porter and present them to Duffy, and also began the process of getting permits from the village.

Kasinecz put into evidence a written contract dated June 15, 2004. The contract provided that Kasinecz would demolish most of the old house and construct a new one to the plans that Duffy had approved, for a total cost of $477,000. The contract bore the signatures of Kasinecz and Duffy. The parties disputed the manner in which the contract was signed. Kasinecz testified that he gave it to Duffy, who signed it. Duffy admitted that the signature on the contract was his, but stated that he had never seen the contract before the suit was filed and did not know how his signature got on the contract, suggesting that perhaps he had inadvertently signed the final page of the contract as one of a stack of papers. The trial court eventually found that the written contract was a valid and enforceable agreement signed by both parties.

Work began on the house. During the demolition and construction, Kasinecz asked Duffy to make progress payments and he did so on approximately four occasions, paying a total of about

$42,000. Duffy did not ask for a sworn contractor's statement when he made these payments, nor did Kasinecz provide one, although Kasinecz testified that he gave Duffy lien waivers that he obtained from his subcontractors.

In early 2005, Kasinecz began asking Duffy for another progress payment. Duffy initially did not respond, and then told Kasinecz that he wanted to see "copies of fronts and backs of checks of everything that he's done—paid his guys and that." Duffy agreed that, on March 6, 2005, Kasinecz gave him "copies of checks, receipts from Home Depot, Hines Lumber, Ace Hardware," and "came up with" the items that he had asked for. The packet of information Kasinecz provided (introduced at trial as Plaintiff's Exhibit 4) was voluminous. Kasinecz asked for a $40,000 progress payment.

Duffy "started thumbing through" the packet of documentation and found a lien waiver from one of the subcontractors, Ron Cole, that aroused his suspicions because he believed that the "R" on the signature line was the same as the "R" in Kasinecz's signature on another document. He met with Kasinecz on March 9, 2005, about the requested payment and confronted him with the two signatures. Kasinecz became incensed at the implicit accusation of forgery. The two men went to the construction site, where the confrontation continued, to the point that Duffy called the police. Kasinecz took his tools, told the workers to leave, and left the site. He performed no further work on the project. At that point, the foundation was completed and the framing was largely completed: the walls were built and sheathed in plywood and Tyvek, and the roof was framed and about 90% sheathed in plywood, with a few feet of shingles on in one place. The windows were not installed and no mechanicals had been installed. Kasinecz sent Duffy letters attempting to resolve the situation, with no result. On March 25, 2005, Kasinecz recorded a mechanic's lien and mailed out notice of the lien and his intent to foreclose on it.

Kasinecz filed suit on April 28, 2005. The complaint, which named as defendants Duffy, the mortgage holder National City Bank (NCB), and other parties with known and unknown interests, included claims for foreclosure of the mechanic's lien, breach of contract, *quantum meruit*, unjust enrichment, and fraud. Duffy filed an answer that included the affirmative defenses of waiver and violation of the Home Repair and Remodeling Act (Home Repair Act) (815 ILCS 513/1 *et seq.* (West 2004)). Later, Duffy filed counterclaims based on alleged violations of the Home Repair Act, the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 2004)), and breach of contract.

The case went to a bench trial on June 23, 2008. At the end of NCB's opening statement, its attorney stated that he had not seen "the Section 5 affidavit" (sworn contractor's statement) from Kasinecz, and asserted that if in fact Kasinecz had not supplied Duffy with such an affidavit he could not enforce either the contract or his lien against third parties. There was no response to or further mention of this argument at that time. Kasinecz called the witnesses whose testimony is summarized above (himself, Duffy, and Marie Kasinecz), and also the following persons.

Ronald Cole testified for Kasinecz that he did in fact sign the lien waiver that aroused Duffy's suspicions, even though it looked different from a handwriting sample Duffy asked him to produce while he was standing on a ladder on March 9, 2005 (the day the work stopped). Brock Porter testified that he was the architect who had drawn up the blueprints for the project. On March 17, 2005, after work on the project had stopped, he visited the site at Duffy's request and prepared a letter in which he listed 13 areas in which the house as built differed from the plans. At trial, he conceded that many of his concerns later proved to be unfounded and that the other concerns could have been corrected during the remainder of the construction if the project had proceeded. Richard Kristie, a structural engineer, visited the site at Kasinecz's request in September 2005 to review the basis for the concerns expressed by Porter in March, and testified regarding the condition of the house at that time, rebutting Porter's concerns. He concluded that, in his opinion, any deviations from the plans were either minor or could easily have been remedied during the remaining construction. He also opined that the house was built better than many of the houses he had inspected over the years. Christopher Krupp, an architect and builder, was called by Duffy (out of order) and testified that he inspected the house in July 2006. He wrote a report evaluating the structure and its suitability for completion in which he found several variations from the plans, some of which were minor or easily remedied and some of which were not. However, on cross-examination, he conceded that some of the most major variations and those which would have made it very difficult to complete the existing structure to code (such as load-bearing outer walls that appeared to violate the setback requirements) turned out not to be violations after all under the village zoning code. In his report, he estimated that the value of the work completed by Kasinecz was $79,450. However, on cross-examination he confirmed his deposition testimony, in which he conceded that he had not taken several categories of expenses (permits, a basement change order, etc.) into account in reaching that figure, and that if all of these expenses were included, the value of the house in July 2006 was approximately $141,640. That figure did not include any profit for Kasinecz; if the normal builder's profit were included, the work would have cost $164,302. Krupp believed that, at the time he saw the structure, it could have been completed, despite some problems such as water that had accumulated in the basement. However, doing so might have required substantial expenditures. In January 2007, after the village cited Duffy and took him to court for failing to maintain the exterior of the structure, the parties agreed that the structure could be torn down. At the end of the day on the fourth day of trial, June 26, 2008, Kasinecz advised the court that he had completed his case in chief. Trial was continued until June 30. There is no mention in the record of any motion for a directed finding.

When trial recommenced on June 30, both NCB and Duffy moved orally for a "directed verdict" (directed finding). The attorneys for NCB and Duffy argued that, because Kasinecz had not given Duffy a sworn contractor's statement pursuant to section 5 of the Mechanic's Lien Act (Lien Act) (770 ILCS 60/5 (West 2006)), he could not maintain either his lien foreclosure claim or his breach of contract claim. They cited three cases, "*Ambrose*" [*v. Biggs,* 156 Ill. App. 3d 515 (1987)], "*Malesa*" [*v. Royal Harbour Management Corp.,* 187 Ill. App. 3d 655 (1989)], and "*Northwest*" [*Millwork Co. v. Komperda*, 338 Ill. App. 3d 997 (2003)], as supporting their argument. In response, Kasinecz's attorney stated that he had not had an opportunity to look at the case law and would ask that the defendants file written motions and that Kasinecz be given time to respond. However, Kasinecz's attorney also responded orally in a limited fashion to the defendants' arguments. Duffy's attorney provided a brief rebuttal. The trial court indicated that it was ready to rule immediately.

The trial court began by stating that it had been reviewing case law over the weekend relating to the case. It noted that section 5 of the Lien Act imposes mutual duties: the homeowner has the duty to request a sworn contractor's statement, identifying the subcontractors to whom money is due or will become due, before paying the contractor; and the contractor has the duty to furnish such a statement. The trial court noted Kasinecz's testimony that he provided a sworn contractor's statement to Duffy in December 2004, although he did not produce the original or a copy of that statement at trial. The court continued:

> "However, this construction [*sic*] came to a head on March 9th, and a few days prior to that, I think the credible testimony of Mr. Duffy was that he asked Mr. Kasinecz for the names and telephone numbers of all of the people who were working on the job, as well as any receipts.
>
> And although Mr. Duffy did not ask for a Sworn Contractor's Statement, in so many words, he asked for the information that would be contained in a Sworn Contractor's Affidavit, so I find that that request of Mr. Duffy constituted a request under the Illinois Mechanic's Lien Act.
>
> It thereupon became the duty of Mr. Kasinecz, who, by his own testimony, has been involved in the construction business for a long time, ***
>
> It became his duty to provide a Sworn Contractor's Affidavit, and he did not do so; and the case law is quite clear that having been requested to provide the information in a Sworn Contractor's Statement and having failed to provide a Sworn Contractor's Affidavit, he loses all of his Mechanic's Lien rights.
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> ***
>
> Now, I think the holding of *Malesa* is that a failure to provide a Mechanic's Lien Sworn Affidavit then renders any contract claim that a contractor may have to be unavailing, so he no longer has either a Mechanic's Lien case—claim, nor does he have a contract action because he has failed, up to this point in time—

He could have at any time within the past three years that this case has been on file, provided a Sworn Contractor's Affidavit, but he has not done so. Therefore, he loses any rights he may have had under the contract."

The trial court went on to consider the issue of when and whether the parties entered into a contract. It found that the evidence supported a finding that the parties entered into an oral contract in April 2004, and entered into a valid and enforceable written contract on June 15, 2004, that served as a novation of their oral contract. The trial court concluded that, because there was a valid written contract, Kasinecz could not recover for his work in *quantum meruit*. The court acknowledged that it had ruled that recovery under the contract was barred by its ruling regarding the sworn contractor's statement, but stated that this did not change the legal principle that the existence of a written contract prevents any recovery in *quantum meruit*. The trial court also ruled that, because there was a valid written contract for the work, Duffy's counterclaim under the Home Repair Act (which was premised on the lack of such a contract) must be dismissed. Finally, the trial court found that Kasinecz could not recover on his claim for unjust enrichment because Duffy had demolished the partially-built house, and thus had received no benefit from Kasinecz's work.

Shortly after the entry of an order to this effect, NCB voluntarily dismissed its third-party action. Kasinecz appealed the trial court's entry of judgment against him on his claims, but we dismissed the appeal as premature. Thereafter, the trial court heard and decided two further matters, including Duffy's petition for attorney fees and costs, which argued that Duffy had prevailed in the litigation and so was entitled to costs and fees under the contract. The last of these matters was resolved on February 8, 2010. Kasinecz filed a timely notice of appeal from: (1) the trial court's June 30, 2008, order entering judgment in favor of the defendants; (2) the November 19, 2008, order granting Duffy attorney fees and costs as the prevailing party; and (3) the August 6, 2009, order setting the amount Kasinecz owed Duffy under the November 2008 order at $55,000. Duffy did not file a cross-appeal.

ANALYSIS

Jurisdiction

As always, we begin our analysis by examining any jurisdictional issues that may exist, before proceeding to the merits of the appeal. In its brief on appeal, NCB stated that it was renewing the motion it filed earlier in this appeal, which sought to dismiss, for lack of jurisdiction, Kasinecz's appeal from the court order of June 30, 2008. We denied NCB's earlier motion to dismiss on June 16, 2010. While this court has the power to reconsider a previous denial of a motion to dismiss the appeal on jurisdictional grounds (*In re Estate of Gagliardo,* 391 Ill App. 3d 343, 348 (2009)), we decline to do so in this case because the decision to deny the motion was correct. Accordingly, our previous determination that we have jurisdiction over this appeal stands as the law of the case. *See People v. Klepper,* 234 Ill. 2d 337, 346 (2009) (when a court has previously determined the issue of jurisdiction, that determination is the law of the case and need not be addressed in a subsequent decision); *Weiss v. Waterhouse Securities, Inc.,* 208 Ill. 2d 439, 448 (2004) (same). We therefore turn to an examination of the issues raised in the appeal.

Standard of Review

Kasinecz's primary argument on appeal is that the trial court erred in granting the defendants' motion for a directed finding on the basis that Kasinecz failed to give Duffy a sworn contractor's statement after December 2004 and that this failure prevented him from recovering on either his mechanic's lien claim or his breach of contract claim. Kasinecz also argues that, because this ruling was in error, the award of attorney fees and costs to Duffy should be vacated.[1] A trial court's grant of a directed finding is reviewed *de novo*. *Friedman v. Safe Security Services, Inc.,* 328 Ill. App. 3d 37, 47 (2002). We will affirm that grant only where the evidence, viewed in the light most favorable to the nonmovant, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *Id.*

Analysis of Relevant Case Law

In granting the defendants' oral motion for a directed finding against Kasinecz on his mechanic's lien and breach of contract claims, the trial court implied that its ruling was compelled by long-standing Illinois case law. However, a closer look at that case law reveals that the trial court's statements are not an accurate characterization.

The purpose of the Lien Act is "to permit a lien on premises when the owner has received a benefit, and the furnishing of labor and materials have increased the value or improved the condition of the property." *Weather-Tite, Inc. v. University of St. Francis,* 233 Ill. 2d 385, 391

[1] Although the June 30, 2008, order also entered judgment for the defendants on Kasinecz's claims for *quantum meruit* and unjust enrichment, on appeal he did not argue for reversal of the *quantum meruit* disposition and failed to support his request for reversal of the unjust enrichment disposition with any sustained argument or case law. Thus, he has forfeited review of these claims. Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006). Similarly, as Duffy did not file a cross-appeal, the trial court's dismissal of his counterclaims is not before us. Finally, although the June 30, 2008, order does not address Kasinecz's fraud claim, neither of the parties has suggested that that claim remained pending before the trial court after June 30, 2008, nor has it been raised in this appeal. Accordingly, we do not consider it here.

(2009). The statutory requirements for the establishment of the lien, such as the timely filing of the lien and notification of the claim, must be strictly complied with. *Prior v. First Bank and Trust Co. of Mt. Vernon,* 231 Ill. App. 3d 331, 333 (1992). However, once these prerequisites have been met, the Lien Act "should be liberally construed in order to carry out its remedial purpose." *Id.* at 333 (citing cases). Moreover, our supreme court has observed that:

> "The doctrine of strict construction [of the Lien Act's requirements] was never meant to be applied as a pitfall to the unwary, in good faith pursuing the path marked by the statute, nor as an ambuscade from which an adversary can overwhelm him for an immaterial misstep. Its function is to preserve the substantial rights of those against whom the remedy offered by the statute is directed, and it is never employed otherwise." *United Cork Cos. v. Volland,* 365 Ill. 564, 572 (1937).

Thus, strict compliance with even the procedural and time requirements of the Lien Act has been excused where there was no prejudice to the owner's substantial rights. *See Crawford Supply Co. v. Schwartz,* 396 Ill. App. 3d 111, 126 (2009) (where defendant owners did not assert any prejudice, plaintiff subcontractor's failure to serve notice of the lien within 60 days as required by the Act did not bar his mechanic's lien claim).

Section 5 of the Lien Act, the pertinent provision for the purposes of this appeal, states:

> "(a) It shall be the duty of the contractor to give the owner, and the duty of the owner to require of the contractor, before the owner or his agent, architect or superintendent shall pay or cause to be paid to the contractor or to his order any moneys *** a statement in writing, under oath or verified by affidavit, of the names and addresses of all parties

furnishing materials and labor and of the amounts due or to become due to each." 770 ILCS 60/5 (West 2008).

This requirement has been part of the Lien Act and its predecessors, in substantially the same form, for over one hundred years. *See National Wrecking Co. v. Midwest Terminal Corp.,* 234 Ill. App. 3d 750, 763 (1992). "Reading the [Lien] Act as a whole, the purpose of the contractor's sworn statement is to put the owner on notice of subcontractor claims and to create a duty upon the owner to protect the claims of the subcontractors named in the contractor's sworn statement." *Weather-Tite,* 233 Ill. 2d at 393. The owner has a duty to pay subcontractors for work performed on the owner's premises. Thus, when a subcontractor is identified in a contractor's sworn statement as one furnishing materials or labor on the premises, the owner must retain funds sufficient to pay the subcontractor (or else obtain a lien waiver), or risk liability to the subcontractor despite any payments made to the contractor. *Id.* at 393-94 (discussing the holding of an earlier supreme court case, *Kiefer v. Reis,* 331 Ill. 38 (1928)).

The express language of section 5 imposes duties on both the owner and the contractor: the owner has a duty to ask for a sworn contractor's statement (in order to be able to protect against later claims by subcontractors), and the contractor has the duty to provide such a statement. 770 ILCS 60/5 (2008). There has been some disagreement in the case law regarding whether, if the owner does not ask for a sworn statement, the contractor's failure to provide one prevents the contractor from later asserting claims for mechanic's lien or breach of contract.

The earliest cases were unanimous that, where the owner does not ask for a sworn statement, the contractor's failure to provide one does not prevent him from enforcing his lien rights. *See Abbott Electrical Construction Co., Inc. v. Ladin*, 144 Ill. App. 3d 974, 977 (1986) (reviewing appellate court case law from 1909 through 1926); *but see Bryson v. News America Publications, Inc.,* 174 Ill. 2d 77, 95 (1996) (appellate court decisions filed prior to 1935 have no binding authority). In 1979, this court decided *Deerfield Electric Co., Inc. v. Herbert W. Jaeger & Associates, Inc.,* 74 Ill. App. 3d 380 (1979), in which we held that where the agent of the owner (the bank holding the mortgage) *did* ask specifically for a sworn contractor's statement pursuant to section 5 of the Lien Act, and the contractor did not provide one, the contractor forfeited his rights and could not recover on either a mechanic's lien or breach of contract claim. *Id.* at 386. In *Abbott Electrical*, however, we explained that this case did not affect the older rule that the owner's failure to ask for a sworn statement waives the owner's ability to raise, as a defense, the contractor's failure to provide one: "If anything, *Deerfield* reiterated the rule that a mechanic's lien will be defeated by the contractor's failure to comply with section 5 *only* when the owner has requested a contractor's affidavit." *Id.* at 979 (emphasis added). We therefore held that providing a sworn contractor's statement was not a condition precedent to recovery under the Lien Act where the owner did not request such a statement. *Id.*

In the next few years, however, this court took a different tack. In *Ambrose v. Biggs*, we held that a contractor could not recover against the owners on a breach of contract claim if the contractor had not provided a sworn statement pursuant to section 5. We did so although there was no indication in *Ambrose* that the owners had ever asked for such a statement, and they had made the first two progress payments without asking for or obtaining such a statement. *Id.*, 156 Ill. App. 3d at 517. Nevertheless, because of the risk that the owners could end up paying both the contractor (on the breach of contract claim) and the subcontractors (if they brought claims under the Lien Act), we held that the failure to provide a sworn contractor's statement prevented the contractor from recovering on his breach of contract claim. *Id.* at 518. We noted the earlier case law, including *Abbott Electrical*, holding that mechanic's lien claims are not barred when both the owner and the contractor failed to comply with section 5. However, we distinguished that situation on the ground that, in a mechanic's lien claim, all of the subcontractors who have liens on the subject property are necessary parties to the foreclosure action, whereas a breach of contract claim involves only the contractor and the owner(s). *Id.*

Two years later, we decided *Malesa*, another breach of contract claim in which we built upon our holding in *Ambrose* and directly rejected the argument that a contractor need not supply a sworn statement under section 5 unless the owner asked for one. *Id.,* 187 Ill. App. 3d at 660. In *Malesa*, the plaintiff entered into a contract with the defendant to supervise some construction. Three months later, the defendant told the plaintiff that it was canceling the contract. The plaintiff sued for breach of contract. (The complaint did not include a mechanic's lien claim.) The trial court granted summary judgment in favor of the defendant because the plaintiff did not give the defendant a sworn contractor's statement. On appeal, the plaintiff argued that he had not hired any subcontractors or performed any lienable services, and so the sworn statement was unnecessary. He also argued that the defendant had never asked for a sworn contractor's statement, and so his duty to provide one never arose. This court rejected the first argument, holding that it was "readily apparent" that if the contractor had hired no subcontractors, he could have submitted a sworn contractor's statement to that effect. *Id.* at 659. Turning to the second argument, we rejected it as well, based on a narrow reading of the statute: "Section 5 does not explicitly require the owner to make an oral or written request for the contractor's statement, nor does it condition the contractor's duty to provide the statement on receiving such a request." *Id.* at 660. Rather, the court concluded, the only duty section

5 imposed on the owner was the duty to refrain from paying the contractor where it had not received a sworn contractor's statement. *Id.*

Not long after *Ambrose* and *Malesa* were decided, their holdings were rejected by the appellate courts of the Fifth and First Districts. In *Prior*, a case involving a mechanic's lien claim, the Fifth District began by noting the broad remedial purpose of the Lien Act to safeguard the right of contractors and subcontractors to recover for work done when the owner had received a benefit, and the supreme court's statement in *United Cork* that strict compliance with the Lien Act should not be applied to create a "pitfall for the unwary." *Id.*, 231 Ill. App. 3d at 333. It found that the owners had unquestionably received a benefit and that their acceptance of that benefit was knowing. *Id.* The court held that section 5 did not require the contractor to give the owner a sworn statement where the owner did not ask for one, stating that to hold otherwise would allow a "technicality" to "defeat a valid lien." *Id.* Rejecting *Malesa*'s conclusion that the only duty that section 5 imposes upon the owner is to refrain from paying the contractor in the absence of a sworn contractor's statement, the court reversed the trial court's grant of summary judgment in favor of the owners. *Id.*

In *National Wrecking,* 234 Ill. App. 3d at 763-64*,* which involved both mechanic's lien and breach of contract claims, the First District similarly disagreed with the holding of *Ambrose* and *Malesa.* The First District noted that one of its own decisions, *Hall v. Harris*, 242 Ill. App. 315 (1926), had come to the opposite conclusion from *Ambrose* and *Malesa* (it held that a contractor's failure to provide a sworn statement would not prevent him from maintaining a breach of contract claim), and additionally noted early appellate court decisions reaching the same conclusion. *National Wrecking* at 763-64. Rejecting the argument that the Lien Act had been amended since those cases were issued, the court noted that the legislature is presumed to know of and adopt any previous judicial construction of a statute that it leaves unchanged during later amendments; that the relevant portion of section 5 had remained unchanged during the amendment process; and that nothing in the amendments indicated "any intent on the part of the legislature to bar contract actions for failure to *** give a sworn statement pursuant to section 5." *Id.* at 763-64. It therefore declined to adopt the holding of *Ambrose* and *Malesa* and instead adhered to its holding in *Hall*.

In 2003, in *Northwest Millwork Co. v. Komperda*, 338 Ill. App. 3d 997 (2003), this court was invited to reconsider our holdings in *Ambrose* and *Malesa* in light of *National Wrecking* and *Prior*. In *Komperda*, just as in all these cases, the owners had not asked for a sworn contractor's statement and the contractor had not provided them with one prior to filing his complaint, which included breach of contract and mechanic's lien claims. We began by tracing the development of the case law. Then, rather than explicitly disavowing *Ambrose* and *Malesa*, we held that those cases were distinguishable on the ground that, in those cases, there was a possibility that the owners might have to pay twice for the same work because of the contractor's failure to provide a sworn contractor's statement: "the owners' 'refusal to make the final payment in the absence of a contractor's statement was justified in order to protect against potential subcontractors' lien claims.' " *Komperda,* 338 Ill. App. 3d at 1002, quoting *Ambrose,* 156 Ill. App. 3d at 518.

By contrast, in *Komperda* the time for subcontractors to file liens had expired and so there was no danger of such double payment. *Id.* at 1003. Nor had the owners claimed that they were subject to any other actual prejudice arising from the failure to provide the sworn contractor's statement. Accordingly, the appropriate precedent to follow was *Prior* because, absent a claim of prejudice to the owners, "it would be inequitable to allow them to rely solely on a technicality to defeat what otherwise may be a valid contract claim." *Komperda,* 338 Ill. App. 3d at 1003.

Moreover, under *Abbott Electrical*, where the owners did not ask for a sworn contractor's statement, the contractor's failure to provide one did not bar a mechanic's lien claim either. We therefore reversed the trial court's dismissal of the contractor's breach of contract and mechanic's lien claims.

The final case dealing with the issue is *Weydert Homes, Inc. v. Kammes,* 395 Ill. App. 3d 512 (2009).[2] That case differed factually from the others discussed above, in that the owner expressly requested a current sworn contractor's statement "showing the subcontractors and the amounts owed to each of them," making this request both verbally and in writing. *Id.* at 515. Although the contractor had furnished an unsworn statement a few month prior to the written request, it did not submit any sworn statement after the owner requested one. *Id.* Thus, as in *Deerfield*, the owner explicitly requested a sworn contractor's statement pursuant to section, and the contractor failed to provide one. And, as in *Deerfield*, in *Weydert* we held that, where there is an express request for a

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[2]We granted Kasinecz's request to cite, as supplemental authority, the supreme court's recent opinion in *K. Miller Construction Co. v. McGinnis,* 238 Ill. 2d 284, 938 N.E.2d 471 (2010), which relates to the effect of a violation of the Home Repair Act on the contractor's ability to bring a breach of contract claim. However, *Miller* does not speak directly to the Lien Act issue presented here. In *Miller*, the supreme court held generally that where a statute does not explicitly state whether a statutory violation would render a contract unenforceable, courts should apply "a balancing analysis and consider[] the relevant facts and public policies before concluding that [a] plaintiff could not pursue relief for breach of contract." *Id.,* 238 Ill. 2d at ___, 938 N.E.2d at 480. Although this holding indirectly supports the approach of considering whether the lack of a sworn contractor's statement caused the owners any prejudice or injury, we prefer to rest our analysis on the more factually similar cases outlined above.

sworn statement, the contractor's failure to comply with section 5 prevented it from recovering on its mechanic's lien claim. *Id.* at 521. However, we came to a different conclusion on the breach of contract claim. Following the reasoning of *Komperda*, we held that because there was no possible prejudice to the owners arising from the contractor's failure to provide the sworn statement (the time for subcontractors to file lien claims had expired), that failure would not bar the contractor's breach of contract claim. *Id.* at 522.

The case before us is most similar factually to *Komperda*, and we therefore apply its analysis. This is not a case, such as *Deerfield* or *Weydert*, where there was an express request for a sworn contractor's statement under section 5 of the Lien Act. Although the trial court treated Duffy's request for "copies of fronts and backs of checks of everything that he's done—paid his guys and that" as the equivalent of a constructive request for a sworn contractor's statement, this was error. As courts have repeatedly stated, the purpose of a sworn contractor's statement is to protect the owner by allowing him to learn the identity of the subcontractors working on the project and the amounts owed to each so that he can, if necessary, hold back amounts sufficient to pay those subcontractors from the amounts he pays the contractor. *See Weather-Tite,* 233 Ill. 2d at 393. Here, although Duffy did ask Kasinecz for supporting documentation, it appears from the record that his purpose was to verify that Kasinecz was indeed incurring the expenses and making the payments that he claimed, not to identify the subcontractors and the amounts owed to them. Duffy himself testified that Kasinecz gave him the documentation that he asked for, and he never reported feeling any need for a sworn contractor's statement in addition to the materials he received. We also note that the trial court's statement that Duffy asked Kasinecz for the "names and telephone numbers of all the people who were working on the job" (as would be contained in a sworn contractor's statement) is contradicted by the record. Duffy clearly testified that he wanted documentation of Kasinecz's payments and expenses ("fronts and backs of checks"), and did not mention any request that Kasinecz identify all of the subcontractors and provide contact information for them. Duffy's general request for documentation here was not the equivalent of the express request for a sworn statement, and thus *Deerfield* and *Weydert* are inapplicable.

The trial court's reliance on *Ambrose* and *Malesa* was likewise misplaced, because, as we explained in *Komperda*, those cases are inapplicable where there is no possibility that the contractor's failure to supply a sworn statement could prejudice the owner in any way. In *Komperda*, as here, the time for subcontractors to file lien claims for the work they performed had long expired by the time the owner sought to raise the lack of a sworn contractor's statement. Notably, Duffy never raised Kasinecz's failure to give him a sworn contractor's statement at any point during the litigation before the final day of trial, when NCB raised the issue in its motion for a directed finding and Duffy joined in that motion. At that point the time for subcontractors to file lien claims against Duffy had expired and there was no suggestion that Duffy was or could be prejudiced by Kasinecz's failure to give him a sworn contractor's statement. Thus, the concern expressed in *Ambrose* and *Malesa*, about possible prejudice to the owner if the owner were forced to pay the contractor on a breach of contract claim without the protection from subcontractor's lien claims afforded by a sworn contractor's statement, is inapplicable here. *Ambrose* and *Malesa* are therefore inapplicable here.

Instead, under *Abbott Electrical*, *Prior, National Wrecking,* and *Komperda,* when the owner has not asked for a sworn contractor's statement and there is no possibility of prejudice arising from the contractor's failure to provide such a statement, the contractor's failure to provide the sworn statement does not bar a mechanic's lien claim or a breach of contract claim. These cases are premised on two principles. The first is that the owner's failure to request such a statement, coupled with the owner's knowledge of work being done on his premises that confers a benefit, bars the owner from raising the lack of a sworn statement as a defense. This is the reasoning of *Abbott Electrical* and *Prior*. The second principle, stated in*Abbott Electrical, Prior,* and *Komperda,* is that where there is no danger of prejudice to the owner arising from the lack of a sworn contractor's statement, that lack cannot be used as a technicality to defeat a valid claim. We agree with all of this reasoning.

The defendants' arguments do not convince us otherwise. Although their arguments are somewhat difficult to follow, it appears that they ask us to follow *Weydert* to affirm the grant of judgment in their favor on the mechanic's lien (because they argue that Duffy requested a sworn statement and Kasinecz did not provide one), but to depart from *Weydert* and follow *Ambrose* or *Malesa* instead to affirm the grant of judgment in their favor on the breach of contract claim. Their argument does not include much reasoning, consisting mainly of a summary of the facts and holdings of *Ambrose, Malesa, Komperda,* and *Weydert*. We find Kasinecz's citations to authority and reasoning more compelling, for the reasons outlined above. NCB also includes a second argument in their brief that, even if we conclude that the trial court's reliance on *Ambrose* and *Malesa* was incorrect, we should sustain the grant of judgment in their favor on the mechanic's lien claim because Kasinecz's evidence was so inconsistent that no judgment in his favor could ever stand. (Duffy's brief also contains some argument along these lines.) We disagree with this characterization of the evidence. We note that the trial court, which was in a superior position to weigh the evidence and assess the credibility of the witnesses, made no such findings. *Friedman,* 328 Ill. App. 3d at 47 (directed finding should be affirmed only where the evidence, viewed in the light most favorable to the nonmovant, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand). Accordingly, we reverse the trial court's order of June 30, 2008, granting a directed finding in favor of the defendants, and remand for further proceedings.

Finally, we observe that the trial court here ruled on the defendants' motion for a directed finding despite the lack of notice for the oral motion, and despite the plaintiff's request for a written motion and time to respond in writing. Kasinecz has not raised this on appeal as a ground for reversal, and thus we have no occasion to determine whether the trial court's denial of that request and decision to proceed immediately on the oral motion was an abuse of discretion. Nevertheless, we caution the trial court that it may be better practice to grant such requests for time to respond to a dispositive motion: had the trial court granted that request here, this appeal might have been avoided entirely.

The Award of Attorney Fees and Costs Pursuant to the Contract

Kasinecz's remaining argument on appeal is that, if we reversed the trial court's grant of a directed finding in the defendant's favor, the trial court's determination that Duffy was the "prevailing party" in the litigation—and was therefore entitled to attorney fees and costs under the contract—must also be vacated. We agree. We therefore vacate the trial court's orders of November 19, 2008, and August 6, 2009. Upon remand, the parties may renew their arguments on this issue before the trial court as appropriate following the resolution of the substantive claims.

In summary, the order of the circuit court of Du Page County dated June 30, 2008, is reversed, and the orders dated November 19, 2008, and August 6, 2009, are vacated. The cause is remanded for further proceedings consistent with this decision.

Reversed and remanded.