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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

The Honorable Mikell Scarborough, Master in Equity

Case No. 2016-CP-10-2955

Appellate Case No. 2021-000272

TCC of Charleston, Inc. ..... *Plaintiff and Appellant/Respondent*

v.

Concord and Cumberland, LLC, Concord & Cumberland HPR, Leo Hall, Diane Hall, Bea H. Smith, Margaret C. Pope, William D. Foster, Jr., Gene G. Foster, Mattison J. MacGillivray, Teresa MacGillivray, Pamela L. Vaughn, Nelia A. Patricio, Trustee of the Nelia A. Patricio Revocable Trust Agreement, Stuart D. Reeves, Edward T. Strom, Barbara K. Henderson, James R. Clarke, Paul A. Brim, Robert K. Seidl, Jennifer M. Seidl, Robert Kenneth Seidl, II, M. Bert Storey, Thomas R. Mather, Edward T. Strom, 304 Concord & Cumberland, LLC, Marion M. Simpson f/k/a Marion Moore McDonald Simpson, Kathy Gardner, Gregory J. Gardner, Freeman Waterfront Properties, LLC, Jo-Ann Cooper, Betty Y. Segal, Robert M. Levin, and Bonita K. Levin, Donald D. Leonard, Betty L. Beatty, Mattellen, LLC, and Thomas R. Debnam, Trustee of the Trust Agreement of Thomas R. Debnam……..D*efendants and Respondents/Appellants*

PETITION FOR REHEARING

Appellant/Respondent TCC of Charleston, Inc. ("TCC") respectfully petitions this Court for rehearing of this matter pursuant to Rule 221(a), S.C.A.C.R., and suggests it be reheard *en banc* pursuant to Rules 219(b). Its grounds are as follows.[1]

[1] TCC does not provide the lengthy factual and procedural background of this case, as both are thoroughly set forth in the Court's Opinion of March 19, 2025 ("the Opinion").

I. Grounds for Rehearing

TCC requests rehearing, respectfully submitting that this Court's Opinion misapprehended or overlooked the following:

1. That, because the relevant date for whether a lien is timely served is the actual last date of work, TCC cannot be bound by an erroneous date in the statement of account.
2. That the South Carolina Mechanic's Lien Statute (S.C. Code § 29-3-50, "the Statute") prohibits invalidating a lien based on an error in the statement of account. *Id.* at § 29-5-100.
3. That an uncontestedly erroneous date in the statement of account cannot be the basis for invalidating a lien.
4. That an erroneous date in the statement of account cannot be dispositive, there being no requirement in the Statute that a statement of account include the date of last work.
5. That one circuit court judge cannot overrule another.
6. That a circuit court had already ruled TCC was *not* bound by the erroneous date of last work when the Master ruled to the contrary. The Master is bound by the ruling of the circuit court and cannot overrule it.
7. That the *Kitchen Planners* and *Strickland* cases are materially distinguishable from this case.
8. That service of the lien upon the HPR, as the party with whom TCC contracted, who held itself out as the "owner" of the common elements, and who the master deed obligates to contract for repairs to and discharge liens on the common elements, properly constitutes service of the individual unit Owners.
9. That additional discovery is necessary to establish whether TCC's lien was timely served.

A. The Opinion Misapprehends the Mechanic's Lien Statute's Requirements Regarding Timeliness of a Lien.

There is no dispute that the last date of work set forth in the Statement of Account was not actually the last date TCC performed work on the Project. Even leaving aside the question of TCC's work on the Stone Tower through January 2017, the record conclusively establishes that

TCC was on site through June 9, 2016,[2] at the Owner's request, performing work to complete its contract. **R. p. 001992**.

The mechanic's lien statute — which South Carolina courts have made abundantly clear is to be strictly construed [3] — establishes that a lien is timely if it is filed and served within ninety days of *the date of last work*, as the Opinion itself acknowledges *six* separate times. *See* **Op.** at 12, 13, 15, 19. Accordingly, the ninety days to file and serve the lien began, at the earliest, on June 9, 2016. [4] This Court's finding to the contrary is error.

B. The Opinion Misapprehends the Significance of the Language in the Lien Statute that No Lien Shall Be Invalidated Because of an Error in the Statement of Account.

The statute states that no lien shall be invalidated because of an error in the statement of account:

> **Proceedings not invalidated by inaccuracy of statement of account.**
>
> No inaccuracy in such statement relating to the property to be covered by the lien, if the property can be reasonably recognized, or in stating the amount due for labor or materials shall invalidate the proceedings, unless it appear that the person filing the certificate has wilfully and knowingly claimed more than is his due.

S.C. Code § 29-5-100. However, the sole basis set forth in the Opinion for invalidating TCC's lien

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[2] The day before TCC's amended lien was filed.

[3] *E.g.*, *Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 27, 336 S.E.2d 488, 490 (Ct. App. 1985) ("mechanic's liens are purely statutory and can only be acquired and enforced in accordance with the conditions of the statute creating them").

[4] Though not raised by the Parties, the Opinion found that Trident could not use the dates it was onsite performing work on the Stone Tower (through January 2017) in order to calculate timeliness of the lien, as liens may only relate to work performed and moneys owed prior to the filing of the lien. **Op.** at 14. While Trident believes this is error both as a legal and a policy matter and requests rehearing on the question, it is not necessary to use the date related to the Stone Tower work awarded by the Panel, as Trident was onsite performing warranty work through June 9, 2016.

is the erroneous date set forth in TCC's statement of account.[5] The Opinion misapprehends that this language precludes the invalidation of TCC's lien by virtue of an incorrect date of last work in the statement of account.

C. The Opinion Overlooks that One Circuit Court Cannot Overrule Another.

When TCC moved to amend its pleading and remove the erroneous last date of work, the HPR opposed the motion, arguing TCC was bound by the last date of work. The Circuit Court received briefing and heard oral argument on the question before rejecting the HPR's argument and permitting the amendment.

Accordingly, when the Master considered the same question four months later, he erred in not recognizing that the question had already been decided by the Circuit Court and was the law of the case. *See, e.g.*, *Wilkinson v. Wilkinson,* 192 S.C. 497, 7 S.E.2d 447, 449 (1940) ("The proposition is certainly not open to debate that one circuit judge may not reverse another and that the order of a circuit judge made in the due course of the case stands as the law thereof unless and until reversed by the Supreme Court."). The Master therefore erred in finding TCC *was* bound by the prior date, as a Master in Equity is without authority to reverse a prior ruling of the Circuit Court. The Opinion also overlooks this principle.

D. The Opinion Misapprehends TCC's *Res Judicata* Argument.

The Opinion finds that the question of the actual date of last work was not *res judicata* or law of the case because it was not decided by the arbitrators. **Op.** at 14. However, the Court misapprehended that it was not only the arbitrator's findings, but also the Circuit Court's decision

[5] As the Opinion acknowledges, Trident obtained leave from the Circuit Court to amended its pleadings in order to remove the erroneous date of last work. **Op.** at 14. A pleading that has been amended is a nullity. *See Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992). Accordingly, the Opinion does not rely on the erroneous date in prior versions of the pleading as a basis to dissolve TCC's lien, as those prior pleadings are a legal nullity.

on the question that bound the Master. The Circuit Court rejected the contention that TCC was bound by the erroneous date and permitted amendment. This decision was binding on the Master.

E. The Opinion Misapprehends the Applicability of *Kitchen Planners* and *Strickland*.

The Opinion cites and quotes from *Kitchen Planners v. Friedman* [6] and *Strickland v. Gen'l Bldg. & Masonry Contractors, Inc.* [7] for the proposition that TCC is bound by the erroneous date of last work in its statement of account. The Opinion's reliance on these cases is misplaced.

1. Strickland

The dissenting opinion in the *Strickland* case from the North Carolina Court of Appeals—which like the majority opinion is merely persuasive authority in South Carolina—notes that (i) the lien statute in question establishes timeliness of a lien in relation only to the *date of last work*:

> I interpret G.S. 44A-12(b) as meaning that the filing time relates to the time *when the materials were last furnished*, not to the time when claimant *said* they were last furnished. There is no provision in the lien statute which requires any claimant of lien to set out in his claim the date upon which materials or labor were last furnished. There is no requirement that the public be given notice of the last date materials were furnished, and an examiner of public records ordinarily would not be apprised of this date. If the statement of the claimant be controlling, it is conceivable that a claimant could make a false statement about the date when materials were last furnished in order to enlarge the time for filing lien. Claimant can neither enlarge nor reduce the statutory period by an error in stating the time when materials were last furnished.

207 S.E.2d at 732–33. Moreover, the North Carolina statute does not contain a provision comparable to S.C. Code § 29-5-100, which provides that a lien shall not be invalidated due to an error in the statement of account. *Compare* G.S. 44-A-7 *et seq. with* S.C. Code § 29-5-10 *et seq*.

Nor does the Strickland opinion reveal whether the evidence in the case established a

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[6] 432 S.C. 267, 851 S.E.2d 724 (Ct. App. 2020).

[7] 207 S.E.2d 399 (N.C. Ct. App. 1974).

different date of last work, as here. The Opinion overlooks these distinctions and errs in relying on the majority opinion in *Strickland* regarding the timeliness of TCC's lien.

2. Kitchen Planners

The *Kitchen Planners* case relied upon in the Opinion is also inapposite. Unlike here, the opinion in *Kitchen Planners* notes that there was *no* evidence of a date of last work other than the date provided in Kitchen Planner's lien and pleading. 432 S.C. at 282, 8514 S.E.2d at 732. Accordingly, the *Kitchen Planners* court had no other means of determining the date of last work other than to rely upon the representations in the lien and pleading.

Further, unlike here, the contractor in *Kitchen Planners* did not amend, or even seek to amend, its pleading to remove the erroneous date. The Opinion overlooks these distinctions in relying on the *Kitchen Planners* decision.

F. The Opinion Misapprehends the Need for Additional Discovery.

Because TCC should not properly be bound by the erroneous date in its statement of account, the question of the timeliness of the lien revolves around when it was served relative to the last date of work. However, the time in which to serve a lien may be tolled under certain circumstances, such as a party being out of state, a party avoiding service, or when equity requires. S.C. Code § 15-3-30; *Hooper v. Ebenezer Senior Servs. & Rehab Ctr.*, 386 S.C. 108, 115–17, 687 S.E.2d 29, 32–33 (2009).

TCC's process server submitted an affidavit that various homeowners took steps to avoid service. TCC therefore served discovery to establish the residency of various homeowners, what notice they had of Trident's lien and when they had it, and what communications they had regarding service of the same. As that discovery goes to the question of whether the service date should be tolled, it bears on whether the lien was timely served.

G. The Opinion Misapprehends the Effect of Serving the HPR.

TCC did not contract with the individual owners, but rather with the HPR, which is made up of all the individual owners and represents the owners' individual and collective interests. The HPR is responsible under the Master Deed (**R. p. 000486** at §§ 2.3, 3.6(a), 8.1) and Bylaws (**R. p. 001947** at §§ 7.1(c), 7.2(e)) for all contracts concerning the common elements and to satisfy any and all liens on the common elements. The homeowners delegated the responsibility for the common elements to the HPR. The HPR should appropriately be treated as an agent of the homeowners with respect to the common elements and liens thereupon, such that service of such a lien on the HPR constitutes service of the lien on the homeowners.

A holding that a contractor must nevertheless serve all individual unit owners with whom it has had no dealings overlooks the HPR's role and obligations and is antithetical to the purpose of lien rights.

II. Request for Rehearing *En Banc*

For the reasons stated above, TCC requests this Court rehear these issues and respectfully suggests they be reheard *en banc*.

Respectfully submitted:

EPTING & RANNIK, LLC

This 3rd day of April, 2025
Charleston, South Carolina

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PROOF OF SERVICE

I certify that I have served the Plaintiff and Appellant/Respondent TCC of Charleston, Inc.'s Petition for Rehearing on April 3, 2025, addressed to Respondents' counsel of record *via* email to the email addresses below:

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April 3, 2025
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