THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Gordon G. Cooper, Master-in-Equity

Appellate Case No. 2019-000404
Trial Court Case No. 2011-CP-42-0500

Super Suds, LLC, ... Appellant,

v.

Carolina Properties Holdings, LLC and
Walter W. Parker, IV, The United States of America
by and through the U.S. Small Business Administration,
Carolina Clean Greer I, LLC, and Community
Development and Improvement Corporation, ... Defendants,

Of Which

Carolina Properties Holdings, LLC, and
Walter W. Parker, IV are ..... Respondents.

FINAL BRIEF OF RESPONDENTS

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INTRODUCTION AND SUMMARY

In this case, Appellant Super Suds, LLC ("Appellant") disputes that, in 2011, Respondent Carolina Properties Holdings, LLC ("CPH") validly conveyed to Appellant title to a piece of real property in Spartanburg County (the "Property"). But, as correctly held by the trial court, all the legal requirements for a valid conveyance of real property are present here. Further, it would be incredibly inequitable to hold that Appellant did not receive title to the Property because, in 2011, Appellant accepted and never returned a deed unambiguously conveying "complete title" to the Property, and because, in 2011, Appellant accepted possession of the Property and has retained possession of and operated a car wash on the Property for the past eight years. The trial court's ruling should be affirmed.

In September 2011, Appellant purchased a mortgage on the Property from BB&T. *See* Note Purchase & Sale Agreement (R. pp. 344-360). In October 2011, Appellant's counsel, Allan Hill, drafted and provided to CPH a deed-in-lieu of foreclosure (the "DIL") conveying title to the Property from CPH to Appellant, and Appellant's counsel requested that CPH execute the DIL and return it to him. *See* Summ. J. Order dated Sept. 27, 2018 at 2; Affidavit of Walter Parker dated Aug. 4, 2017 ("Parker Aff.") at 2; DIL dated Oct. 24, 2011 (R. p. 041; App. to R.[1]; R. pp. 362-364). CPH promptly executed and returned the DIL to Appellant's counsel. *See id.* The DIL unambiguously provides that CPH conveyed to Appellant "complete title" to the Property and that CPH "has no further interest of any nature whatsoever in and to the above described property or any improvements thereon." *See* DIL (R. p. 362). The DIL also provides that the consideration for the DIL "is the satisfaction and cancellation of" the debt owed by CPH on the mortgage that

[1] Appellant inadvertently omitted Mr. Parker's affidavit from the initial Record on Appeal but later filed an Appendix to the Record on Appeal containing only Mr. Parker's affidavit. The Appendix does not have page numbers.

Appellant previously purchased from BB&T. *Id.* Immediately after executing and delivering the DIL, CPH delivered, and Appellant accepted, the keys to the Property, and Appellant took possession of the Property. *See* Parker Dep. Tr. at 76:8-24; Howard Dep. Tr. at 27:15-18 (R. p. 485, lines 8-24; R. p. 315, lines 15-18). Upon receiving the DIL and possession of the Property in late 2011, Appellant began making improvements to, and operating a car wash on, the Property, and Appellant has continued to operate a car wash on the Property for the past eight years, up through the present date. *See* Howard Dep. Tr. at 27:15 – 29:14 (R. p. 315, line 15 through R. p. 317, line 14). Ken Howard, the sole owner and manager of Appellant, testified in his deposition that, from the time he took possession of the Property in late 2011 until 2016 when this litigation became active, he believed that he owned the Property. *Id.* at 37:18-20; 50:13-18; 28:21 – 29:4 (R. p. 325, lines 18-20; R. p. 338, lines 13-18; R. p. 316, line 21 through R. p. 317, line 4). In sum, in 2011, CPH executed and delivered a deed conveying title to the Property to Appellant; CPH as grantor and Appellant as grantee both believed that CPH conveyed title to the Property to Appellant; and CPH and Appellant both behaved as though CPH conveyed title to the Property to Appellant, with Appellant taking possession of the Property, making improvements to the Property, and operating a car wash on the Property for eight years.

Notwithstanding the above undisputed facts, Appellant now contends that the DIL did not validly convey title to the Property to Appellant, did not result in the cancellation of CPH's indebtedness on the mortgage purchased by Appellant, and, indeed, did not have any legal effect whatsoever. That is, Appellant argues that, even though it accepted and retained possession of both the DIL and the Property and has operated a car wash on the Property for the past eight years, CPH has been the true owner of the Property all of these years, and CPH received *nothing* in exchange for delivering the executed DIL and possession of the Property to Appellant eight years ago. In

support of this contention, Appellant primarily makes two arguments. First, Appellant argues the DIL, which its own counsel drafted and requested CPH execute, is invalid because it fails to comply with South Carolina Rule of Civil Procedure 43(k). Second, Appellant argues its counsel has been holding the DIL "in trust" for the past eight years, and that a condition precedent to Appellant's acceptance of the DIL was Appellant's counsel successfully resolving a junior lien on the Property, and this condition precedent failed to occur. Both of these arguments are meritless.

First, the legal requirements for a valid conveyance of real property are well-settled, and those requirements are plainly met here. Rule 43(k) does not somehow change this law. Indeed, the plain language of Rule 43(k) limits its application to "agreements between counsel" in pending litigation. The conveyance of title to the Property via the DIL was not an "agreement between counsel" in pending litigation. In fact, the DIL effectuated the conveyance of real property from CPH, which was not represented by counsel, to Appellant, who was not even a party to any pending litigation at the time the DIL was negotiated between the parties and executed and delivered by CPH. It was not until *after* CPH executed and delivered the DIL that Appellant was substituted into this litigation in the place of BB&T and became party to litigation. Thus, *neither* of the participants to the negotiation of the DIL were counsel to a party to pending litigation. No court has ever applied Rule 43(k) under circumstances even remotely resembling these, and the plain language of Rule 43(k) makes clear that it does not apply here. Moreover, because Appellant retained the DIL and enjoyed possession of the Property for the past eight years, it would be highly inequitable for Appellant to now be permitted to take the position that CPH has (without knowing it) owned the Property for the past eight years, and received nothing in exchange for delivering the DIL and possession of the Property to Appellant.

Second, no evidence in the record supports Appellant's assertion that its counsel was merely holding the DIL "in trust," subject to the condition precedent that Appellant's counsel successfully resolve a junior lien on the Property. The DIL is unambiguous and says nothing about any condition precedent, nor does any other writing between the parties. Moreover, Appellant's counsel contends that he determined that he could not resolve the junior lien—and that the condition precedent to acceptance of the DIL had therefore failed—*in January 2012*. *See* July 17, 2018 H'rg Tr. at 21:2-12 (R. p. 651, lines 2-12). In fact, Appellant's counsel argued to the trial court that, in January 2012, upon the determination that the junior lien could not be resolved, "the delivery [of the DIL] is effectively repudiated." *Id.* at 21:12 (R. p. 651, line 12). But, in the more than four years between January 2012 and this litigation becoming active in late 2016, neither Appellant nor its counsel ever notified CPH (or anyone else) that the DIL was being repudiated or that any supposed condition precedent to the acceptance of the DIL had not been met; neither Appellant nor its counsel ever returned the DIL to CPH; and Appellant never returned possession of the Property to CPH. *See id.* at 23:2-21 (R. p. 653, lines 2-21). Rather, after the supposed "repudiation" in January 2012, Appellant continued to enjoy possession of the Property, operating a car wash on the Property continuously from late 2011 until the present. Moreover, Appellant did not seek to foreclose on the Property until 2016, which was more than *four years* after Appellant's supposed "repudiation" of the DIL. And, as noted above, Ken Howard, the sole owner of Appellant, testified in his deposition that he believed that he *did* own the Property from the time he took possession in late 2011 until 2016 when this litigation became active. In sum, if Appellant "repudiated" the DIL in January 2012, as it now contends, the repudiation occurred only in the mind of Appellant's counsel and is inconsistent with all the evidence in the record.

Further, although Appellant makes five (5) arguments in its initial brief, only the first argument regarding Rule 43(k) is preserved for appeal. Thus, the Court should not reach the merits of Appellant's remaining four arguments. In any event, all of Appellant's arguments fail on the merits.

Finally, the trial court's ruling may be affirmed on the additional sustaining grounds that Appellant's arguments are barred by the doctrines of equitable estoppel and laches.

COUNTER-STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court correctly grant CPH summary judgment on Appellant's foreclosure claim where CPH conveyed title to the Property to Appellant by executing and delivering to Appellant a deed unambiguously stating that CPH was conveying "complete title" to the Property, and where Appellant accepted possession of the Property, made improvements to the Property, and operated a car wash on the Property for many years before seeking to foreclose?

2. May the trial court's ruling be sustained on the additional grounds that Appellant's arguments are barred by equitable estoppel and laches?

COUNTER-STATEMENT OF THE CASE AND FACTS

In 2005, Respondent Walter W. Parker, IV, formed CPH, which purchased for $212,000 the Property, which is located at 748 East Wade Hampton Boulevard, Greer, South Carolina, and which was undeveloped at the time of purchase. *See* Deed dated Aug. 23, 2005; Parker Dep. Tr. at 33:15-21; Parker Aff. at 1 (R. pp. 527-528; R. p. 442, lines 15-21; App. to R.). After purchasing the property, CPH obtained a loan of $585,000 from BB&T, constructed a car wash on the Property, purchased equipment, and began operating the car wash. *See* Parker Aff. at 1; Parker Dep. Tr. at 62:22 – 63:3 (App. to R.; R. p. 471, line 22 through R. p. 472, line 3). In exchange for the loan, CPH executed a mortgage and note in favor of BB&T, and Parker personally guaranteed the note. *See* Mortgage; Note; Guaranty (R. pp. 539-544; R. pp. 532-538; R. pp. 545-547). In 2007, CPH obtained two loans totaling $159,500 from the United States Small Business Administration

(the "SBA") and executed a mortgage, which is subordinate to the BB&T mortgage, in favor of the SBA. *See* Parker Dep. Tr. at 63:21 – 65:16 (R. p. 471, line 21 through R. p. 472, line 16). Parker and his wife personally guaranteed the SBA loans. *Id.*

On February 2, 2011, BB&T filed a foreclosure action against CPH and Parker (collectively, "CPH") to foreclose on the mortgage. *See* Complaint (R. pp. 069-072). The SBA was named as a defendant to the foreclosure action because of its subordinate lien on the Property. *Id.* The Community Development and Improvement Corporation (the "CDIC") was also named as a defendant because it previously held a security interest on equipment on the property. *Id.* On April 21, 2011, CPH filed an answer and counterclaims against BB&T. *See* Answer & Counterclaims (R. pp. 073-074).

In the summer of 2011, Parker contacted Ken Howard, who has owned and operated car washes for many years and who is the owner and manager of Appellant, about purchasing the Property where the car wash was located. *See* Parker Dep. Tr. at 108:21 – 110:25; Howard Dep. Tr. at 4:16-19; 4:1-8 (R. p. 517, line 21 through R. p. 519, line 25; R. p. 292, lines 1-8). Howard expressed interest in purchasing the Property, and Alan Hill, an attorney who represented Howard and Appellant, negotiated an agreement for Appellant to purchase BB&T's mortgage and note. Howard Dep. Tr. at 15:16 – 16:21 (R. p. 303, line 16 through R. p. 304, line 21). On August 18, 2011, Parker sent Hill an email that says: "It was a pleasure to speak with you. Here is the contact information I promised: . . . ." *See* Parker E-Mail dated Aug. 18, 2011 (R. pp. 212-213). Parker then provides contact information for representatives at the SBA and CDIC. *Id.* With respect to the SBA, Parker identifies Derenda Fisher as his "point of contact," and he identifies Greg Dixon as "the individual who said they would take $2,000 to go away." *Id.* In this email, Parker makes

no promises or proposals to enter into an agreement; rather, he merely provides contact information. *Id.*

On September 16, 2011, Appellant executed an agreement with BB&T to purchase the mortgage and note from BB&T for $200,000. *See* Note Purchase & Sale Agreement (R. pp. 344-360). At the time, the balance of the mortgage and note was approximately $600,000. *See* DIL (R. p. 362). Around the same time, CPH entered into an agreement with BB&T whereby BB&T agreed to sell its mortgage and note to Appellant in exchange for CPH dismissing its counterclaims against BB&T in the pending foreclosure action. *See* Settlement Agreement & Mutual Release of Claims (R. pp. 601-605). On September 20, 2011, immediately before executing the settlement agreement with BB&T, Parker emailed Hill and confirmed that he was about to execute the settlement agreement with BB&T, and "memorialized the verbal agreement" between Parker and Hill, stating:

> I wanted to memorialize the verbal agreement we have that Ken Howard, Super Suds LLC and/or the new note holder will not pursue a deficiency judgment against [CPH] or me. Also, I heard you say that Ken Howard, Super Suds LLC and/or the new note holder would not be filing a 1099 for the forgiveness of debt. Please let me know if my understanding is correct.

See Parker E-Mail dated Sept. 20, 2011 (R. p. 150). Hill responded the same day and said: "Your understanding is correct." *Id.* There is no reference in this email (or in any other email) to any other verbal agreements between Parker and Hill. *See id.*

On October 19, 2011, Hill sent to Parker the DIL, which Hill drafted, and requested that Parker execute the DIL on behalf of CPH and return the DIL to Hill. The DIL provides:

> Grantor, in executing and delivering this deed to Grantee, acknowledges that this is an absolute deed and not a mortgage. Grantor further acknowledges that he is conveying complete title to the above described property to the Grantee herein, and the Grantor

> has no further interest of any nature whatsoever in and to the above described property or any improvements thereon.

See DIL (R. pp. 362-363). The DIL also states that "[t]he consideration for this deed is the satisfaction and cancellation of an indebtedness from the Grantor to the Grantee as evidenced by" the mortgage granted to BB&T and subsequently sold to Appellant, and says that "[t]he loan balance of said mortgage and the note secured by said mortgage is the sum of $601,427.10." *Id.* The DIL does not say its effectiveness is subject to any condition precedent, does not say it shall be held in trust, and does not otherwise indicate the conveyance of title to the Property will be delayed after the Grantor executes and returns the DIL. *See id.* As is customary with deeds, the DIL has blanks for CPH as Grantor to sign and have the deed notarized, has blanks for two witnesses to sign, and does not have a blank for the Grantee (or the Grantee's counsel) to sign the DIL. *See id.*

On October 24, 2011, Parker (and two witnesses) signed the DIL, and the DIL was notarized. *See id.* Also on October 24, 2011, Parker mailed the executed DIL back to Hill. Parker Aff. at 2; DIL; Parker Dep. Tr. at 99:13-24 (App. to R.; R. pp. 362-363; R. p. 508, lines 13-24). Soon after delivering the executed DIL to Hill, Parker delivered the keys to the car wash to Howard at his office. *See* Parker Dep. Tr. at 76:8-24; Howard Dep. Tr. at 27:15-18 (R. p. 485, lines 8-24; R. p. 315, lines 15-18). On October 31, 2011, the Court issued an Order substituting Appellant for BB&T in the foreclosure action. *See* Consent Order dated Oct. 31, 2011 (R. pp. 006-009).[2]

Upon receiving possession of the Property, Appellant began to make improvements to the Property, put a "Super Suds" sign on the Property, and began to operate a car wash on the Property.

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[2] This Order is captioned "Consent Order Substituting Parties Pursuant to Rule 25(c) and Substituting Counsel." However, the Order was signed by and consented to only by counsel to BB&T, Appellant, and the junior lienholders; there is no indication that CPH or Parker ever consented to the Order. *See* Order dated October 31, 2011.

See Howard Dep. Tr. at 27:15 – 29:14 (R. p. 315, line 15 through R. p. 317, line 14). Mr. Howard testified in his deposition that, upon receiving possession of the Property, he believed that he was the owner of the Property, and he continued to believe that he was the owner of the Property until 2016 when this litigation became active. Howard Dep. Tr. at 37:18-20; 50:13-18; 28:21-29:4 (R. p. 325, lines 18-20; R. p. 338, lines 13-18; R. p. 316, line 21 through R. p. 317, line 4). He relied on his attorney to handle the details. *Id.* at 27:5-9 (R. p. 315, lines 5-9). Mr. Howard did not expect to receive any money from Mr. Parker or CPH after he purchased the Property. *Id.* at 33:16 – 34:5 (R. p. 321, line 16 through R. p. 322, line 5). Further, Mr. Howard was not even aware of any litigation relating to the Property until 2016. *Id.* at 37:10-13 (R. p. 325, lines 10-13). Mr. Howard does not segregate—and, instead, commingles—the revenues and expenses for each of his car washes. *Id.* at 41:23 – 42:4; 45:14 – 48:5 (R. p. 329, line 23 through R. p. 330, line 4; R. p. 333, line 14 through R. p. 336, line 5). Likewise, Mr. Howard does not understand that he may be required to apply any profits from the Property to the debt on the mortgage. *Id.* at 50:3-6; 44:15 – 45:13 (R. p. 338, lines 3-6; R. p. 332, line 15 through R. p. 333, line 13).

Around December 2011 or January 2012, Hill attempted to negotiate with the SBA on behalf of Appellant, and Hill determined that he could not resolve the SBA subordinate mortgage for $2,000. *See* July 17, 2018 H'rg Tr. at 20:21 – 21:12 (R. p. 650, line 21 through R. p. 651, line 12). On September 25, 2014, the foreclosure action was transferred to the Spartanburg County Master-in-Equity via an Order of Reference. *See* Order of Reference (R. pp. 010-011). On August 9, 2016, new counsel filed a Notice of Appearance on behalf of Appellant in the foreclosure action, and the foreclosure action became active again. *See* Notice of Appearance for Appellant (R. pp. 694-695). At that point, counsel filed a Notice of Appearance on behalf of CPH and Parker, and CPH and Parker have been represented by counsel in this litigation at all times thereafter. *See*

Notice of Appearance for CPH (R. p. 698). Aside from the Order of Reference entered in September 2014, the foreclosure action remained dormant (and CPH and Appellant had no communication with one another) for approximately *five years*, from October 2011 until August 2016. *See* Online Docket; Parker Dep. Tr. at 111:1 – 8 (R. pp. 707-718; R. p. 520, lines 1-8).

It is undisputed that, between receiving the DIL and possession of the Property in fall 2011 and this litigation becoming active nearly five years later, Appellant never returned the DIL to CPH, never returned possession of the Property to CPH, never notified CPH that the DIL was being repudiated, and never communicated in any way to CPH that Appellant did not believe it owned the Property. Indeed, Howard testified in his deposition that, throughout the time period of late 2011 through summer 2016, he believed he *did* own the Property. Howard Dep. Tr. at 37:18-20; 50:13-18; 28:21 – 29:4 (R. p. 325, lines 18-20; R. p. 338, lines 13-18; R. p. 316, line 21 through R. p. 317, line 4).

Between the foreclosure action becoming active in August 2016 and the summer of 2018, the parties conducted discovery. On April 5, 2017, CPH filed a motion to dismiss. *See* Mot. Dismiss (R. pp. 100-101). Although captioned as a motion to dismiss, the motion states that it will be supported by "discovery." *See id.* On May 26, 2017, CPH filed both a motion to disqualify Hill from serving as counsel of record in this litigation and a motion to compel Hill's deposition. *See* Motion to Disqualify; Motion to Compel (R. pp. 102-103; R. pp. 104-106). Appellant opposed these motions, arguing that Hill should be permitted to continue to be counsel of record in this action, that Hill does not have unique knowledge of facts relevant to this dispute, that CPH should not be permitted to seek Hill's testimony only to get his "version of events," and that "Mr. Hill will never testify at a trial on the merits in this case." *See* Mem. Opp. Motion to Compel at 6; Aug. 4, 2017 H'rg Tr. at 12:8-9 (R. p. 117; R. p. 269, lines 8-9). On September 1, 2017, the Court issued

an Order denying CPH's motions to disqualify and to compel, finding that Hill could continue to act as attorney of record for Appellants. *See* Sept. 1 Order (R. pp. 013-018).

On August 11, 2017, Appellant filed a memorandum in opposition to CPH's motion to amend its answer and argued that "the debt owed to [Appellant by CPH] now exceeds $700,000." *See* Mem. Opp. at 2 (R. p. 114). That is, even though Appellant's counsel drafted the DIL stating that CPH was conveying title to the Property in exchange for cancellation of the indebtedness on the mortgage, and even though Appellant has enjoyed possession of, and revenue from, the Property for the past eight years, Appellant now takes the position that CPH's debt on the mortgage Appellant purchased was never cancelled and has continued to increase on a daily basis from October 2011 through the present, and that CPH received *nothing* in exchange for executing and delivering the DIL to Appellant and conveying possession of the Property to Appellant eight years ago.

On December 6, 2017, CPH filed an amended answer and counterclaims, alleging, among other things, that the foreclosure action could not be maintained by Appellant because a merger of title occurred when CPH conveyed title to the Property to Appellant via the DIL. *See* Am. Ans. & Counterclaims (R. pp. 082-092). On January 10, 2018, Appellant filed a reply to CPH's amended answer and counterclaims and alleged, among other things, that the DIL was not effective to convey title to the Property to Appellant because the DIL was being held by Hill "in trust," and that CPH had not pled the existence of a written settlement agreement enforceable under Rule 43(k). *See* Reply to Counterclaims (R. pp. 093-099). On April 18, 2018, Appellant filed a "Motion for Declaration Under Rule 43(k)," in which Appellant argued that most of CPH's affirmative defenses and counterclaims failed under Rule 43(k) "because there is no settlement agreement" between Appellant and SPH. *See* Mot. Dec. Rule 43(k) (R. pp. 124-127).

On June 14, 2018, Howard and Parker were deposed. On July 9, 2018, pursuant to the trial court's briefing schedule, Appellant filed a memorandum in support of its Motion for Declaration Under Rule 43(k), *see* Mem. Supp. Mot. (R. pp. 128-135), and CPH filed a "Memorandum of Law in Support of Motion to Dismiss or in the Alternative Motion for Summary Judgment." *See* Mem. Supp. Mot. (R. pp. 162-179). In its memorandum, CPH argued that it conveyed title to the Property to Appellant via the DIL, that a merger of title occurred when Appellant obtained title to the Property, and that Appellant therefore could not foreclose on the Property. *Id.* CPH attached several exhibits, including excerpts from Howard's deposition, to the memorandum, such that it was clear that CPH was primarily seeking summary judgment under Rule 56, not dismissal under Rule 12. *See id.* Also on July 9, 2019, CPH filed a memorandum in opposition to Appellant's Motion for Declaration Under Rule 43(k). *See* Mem. Opp. Mot. (R. pp. 136-161).

On July 17, 2018, the Court held a hearing on CPH's motion to dismiss or in the alternative for summary judgment and on Appellant's motion seeking a declaration under Rule 43(k). At the outset of her argument at the hearing, CPH's counsel stated that CPH was seeking summary judgment. July 17, 2018 H'rg. Tr. at 15:15 (R. p. 015, line 15). At no point during the hearing did Appellant's counsel object to the trial court ruling on CPH's motion for summary judgment or argue that it needed to conduct additional discovery. *See generally* July 17, 2018 H'rg Tr. (R. pp. 631-661). Also, at no point during the hearing did Appellant request that the trial court allow Hill to testify or to submit an affidavit to the trial court. *See generally id.* At the end of the hearing, the trial court stated on the record that it was granting CPH's motion for summary judgment and denying Appellant's motion for a declaration under Rule 43(k), and explained on the record the bases for these rulings and asked counsel to prepare proposed orders. *See id.* 27:25 – 29:8 (R. p. 657, line 25 through R. p. 659, line 8).

On September 7, 2018, which was after the trial court's ruling on the record at the hearing but before the trial court issued its Order, Appellant filed a document with the Court, without requesting or obtaining leave of the court, captioned "Plaintiff's Submission of Affidavit of Counsel," and attached an affidavit signed by Hill on September 7, 2018. *See* Pl. Sub. Aff. (R. pp. 699-700). The affidavit is unusual in that it is comprised *entirely* of excerpts from Appellant's memoranda previously submitted to the Court, excerpts from an Order previously issued by the Court, and excerpts from the July 17, 2018 hearing transcript. *See* Hill Aff. (R. pp. 701-706).

On September 27, 2018, the Court issued its Order granting CPH's motion for summary judgment and its Order denying Appellant's motion for a declaration under Rule 43(k). *See* Orders (R. pp. 033-039 and R. pp. 040-048). On October 8, 2018, Appellant filed motions to reconsider the Court's two Orders issued on September 27, 2018, raising several new arguments that Appellant had not raised prior to the trial court's rulings. *See* Motions Reconsider (R. pp. 214-219). On October 15, 2018, CPH filed a motion to strike Hill's affidavit from the record. *See* Mot. Strike (R. pp. 229-238). On January 17, 2019, the Court held a hearing on Appellant's motions to reconsider and CPH's motion to strike. *See generally* Jan. 17, 2019 H'rg Tr. (R. pp. 662-693). On February 6 and 13, 2019, the Court issued Orders denying Appellant's motions to reconsider and granting CPH's motion to strike Hill's affidavit from the record. *See* Orders (R. pp. 052-059 and R. pp. 060-065). This appeal followed.

ARGUMENT

I. The trial court correctly granted summary judgment to CPH on Appellant's foreclosure claim because Appellant received title to the Property and is therefore barred from foreclosing under the doctrine of merger.

In this appeal, Appellant disputes that CPH validly conveyed title to the Property to Appellant in 2011. The legal requirements for a valid conveyance of real property are well-established. Yet, conspicuously absent from Appellant's brief is any discussion of this law.

Under South Carolina law, CPH plainly conveyed legal title to the Property to Appellant in 2011. As discussed in more detail below, it is undisputed that the DIL unambiguously provides that CPH is conveying "complete title" to Appellant, without any conditions; it is undisputed that CPH delivered the executed DIL to Appellant; and Appellant accepted the DIL (which Appellant's counsel drafted and asked CPH to execute and return) by accepting and never returning the DIL for the past eight years, and also by accepting and never returning possession of the Property for the past eight years. Further, the law is clear that, because Appellant received legal title to the Property, the doctrine of merger prohibits Appellant from foreclosing on the Property.

A. The DIL unambiguously conveys "complete title" to the Property from CPH to Appellant.

"In construing a deed, the intention of the grantor must be ascertained and effectuated unless that intention contravenes some well-settled rule of law or public policy." *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391 (1987). Importantly, "[t]he intention of the grantor must be found within the four corners of the deed." *Id.* "The construction of a clear and unambiguous deed is a question of law for the court," and "[t]he terms of an unambiguous deed may not be varied or contradicted by evidence drawn from sources other than the deed itself." *Id.* at 25, 358 S.E.2d at 392. "The language in a deed is ambiguous if it is reasonably susceptible to more than one interpretation." *Penza v. Pendleton Station, LLC*, 404 S.C. 198, 204, 743 S.E.2d

850, 853 (Ct. App. 2013) (internal citation omitted). "When a deed is unambiguous, any attempt to determine the grantor's intent . . . must be limited to the deed itself and using extrinsic evidence to contradict the plain language of the deed is improper." *Id.* at 205, 743 S.E.2d at 853. "South Carolina law provides that ambiguous documents should be interpreted against the drafter." *In re Joyner*, 326 B.R. 334, 341 (Bankr. D.S.C. 2004); *see also Duncan v. Little*, 384 S.C. 420, 426, 682 S.E.2d 788, 791 (2009).

Here, the DIL, which Appellant's counsel drafted, is unambiguous. Indeed, Appellant has not even argued that the DIL is ambiguous. The DIL states:

> Grantor, in executing and delivering this deed to Grantee, acknowledges that this is an absolute deed and not a mortgage. Grantor further acknowledges that he is conveying complete title to the above described property to the Grantee herein, and the Grantor has no further interest of any nature whatsoever in and to the above described property or any improvements thereon.

See DIL (R. pp. 362-363). The DIL also unambiguously states that "[t]he consideration for this deed is the satisfaction and cancellation of an indebtedness from the Grantor to the Grantee" as evidenced by the mortgage purchased by Appellant. *Id.* Nowhere does the DIL state that its effectiveness is subject to any condition precedent, state that it shall be held in trust, or otherwise indicate that the conveyance of title to the Property will be delayed after the Grantor executes and returns the DIL. *See id.* Because it is undisputed that the DIL is unambiguous, the Court need not—and, indeed, should not—look beyond the four corners of the DIL to determine its effect. Under the plain language of the DIL, CPH conveyed "complete title" to the Property to Appellant.

Moreover, even if the Court were to look beyond the four corners of the DIL, no other document reflects an agreement to condition acceptance of the DIL on resolution of the junior lien (or on any other event). Further, and as recognized by the trial court, the conduct of the parties after delivery of the DIL is consistent with an intent for CPH to convey title to the Property to

Appellant. After delivery of the DIL to Appellant, Appellant accepted possession of the Property and has operated a car wash on the Property for the past eight years. Also, Appellant has not segregated its revenues and expenses from the car wash on the Property—rather, it has commingled its revenues and expenses with those from other car washes it owns—and Appellant likewise has not applied any profits from the Property to the mortgage debt, or taken any other actions that would be required if Appellant were merely a mortgagee-in-possession.

B. It is undisputed that CPH validly delivered the DIL to Appellant.

The South Carolina Court of Appeals has summarized the law governing delivery of a deed as follows:

> It is a well established rule of law that a deed is not legally effective until it has been delivered. There is no prescribed method for an effective delivery of a deed; manual transfer of the instrument into the hand of the grantee is neither required to effectuate a valid delivery, nor is such transfer dispositive of the issue. Delivery is a question of intent. The legal effectiveness of a deed delivery "rests not in words written, but in things done and said." The term delivery in this regard refers to "not so much a manual act but the intention of the maker . . . existing at the time of the transaction not subsequently and not subject to later change of mind." That is, an effective delivery of a conveyance contains two parts: (1) an intention to deliver, and (2) an act evincing a purpose to part with control of the instrument. It has long been recognized that neither of these two parts is, standing alone, sufficient to constitute delivery; rather, the parts must exist concurrently.

First Union Nat. Bank of S.C. v. Shealy, 325 S.C. 351, 355, 479 S.E.2d 846, 848 (Ct. App. 1996).

Here, it is undisputed that CPH validly delivered the DIL to Appellant by mailing the DIL to Appellant's counsel, Allan Hill, on October 24, 2011. *See* Parker Aff. at 2; Parker Dep. at 99:13-24 (App. to R.; R. p. 508, lines 13-24).

C. Appellant accepted the DIL.

The law of most states requires both delivery and acceptance of a deed to validly convey title to real property. *See, e.g., Panhandle Baptist Found., Inc. v. Clodfelter*, 54 S.W.3d 66, 71 (Tex. App. 2001) ("Thus, conveyance of property is not complete without both delivery by the grantor and acceptance by the grantee."). The only South Carolina Supreme Court case to address the issue, however, refused to reach the question of whether title to real property is conveyed upon delivery of the deed, or if there must also be acceptance by the grantee. *See Branton v. Martin*, 243 S.C. 90, 98-100, 132 S.E.2d 285, 288–90 (1963).

In *Branton*, Sarah Branton gave a deed to her son, Sam Branton, that conveyed a remainder interest in certain real property to Sam and her other children. Sam did not know the document was a deed (nor did he read the deed) and immediately took the document to his sister's house and gave it to her. After Sarah's death, one of Sarah's children (Maggie) challenged the validity of the deed on the ground (among others) that the deed was not validly accepted by Sam, who not only did not read or sign the deed, but who also was "ignorant of the nature of the instrument." The Court rejected this argument:

> The final contention made by appellants with respect to this deed is that Sam Branton, being ignorant of the nature of the instrument, could not accept delivery of it as a deed; hence, title did not pass. No case has been cited in which the delivery of a deed by a grantor to a grantee, who accepts and retains it, has been held ineffectual because of the grantee's failure to inform himself of the terms of the instrument.

Id. at 98, 132 S.E.2d at 289. The Court then recognized that "[i]n some jurisdictions," where a grantee is ignorant of the terms of a deed (as was the case with Sam Branton), the grantee will nevertheless be presumed to have accepted the deed if the conveyance is beneficial to the grantee. *Id.* at 99-100, 132 S.E.2d at 289-90. Ultimately, the Court held it need not reach the question of

whether, on the one hand, a conveyance is valid upon delivery without any need for acceptance, or, on the other hand, acceptance is required but is presumed where the grantee is ignorant of the terms of the deed but the terms are beneficial to the grantee. The Court did not reach this question because, "[u]nder either view, the result is the same." *Id.* at 100, 132 S.E.2d at 290.

In its brief, Appellant cites *Branton* for the proposition that a presumption of acceptance of a deed "exists *only if* the voluntary conveyance of a deed is beneficial to the recipient." App. Br. at 32-33 (emphasis added). But this is not what *Branton* says, and this is not the law. By recognizing that, in some jurisdictions, where the grantee is ignorant of the terms of a deed, a presumption of acceptance arises where the deed's terms are beneficial to the grantee, the Court did not hold that this is *the only* way for a grantee to validly accept a deed. Indeed, the Court in *Branton* refused to reach the question of whether acceptance of the deed was required at all.

In any event, even if South Carolina were to recognize a separate "acceptance" requirement for deeds (and *Branton* specifically refuses to reach this issue), it is hornbook law that a grantee accepts a deed by failing to return or repudiate the deed, or by exercising ownership over the property conveyed. *See, e.g.*, 23 Am. Jur. 2d Deeds § 151, *What constitutes, and prerequisites to, acceptance; intention to accept* ("Express words and positive acts are not necessary; intention to accept may be inferred from such conduct as conveying or mortgaging the property, recording the deed, or otherwise exercising the rights of an owner provided the grantee had, at the time of such action, knowledge of the conveyance."); *Washington Homes Ass'n v. Wanecek,* 252 Wis. 485, 489, 32 N.W.2d 223, 225 (1948) ("In the determination of whether there has been an acceptance of a deed on the grantee's part, . . . [e]xpress words and positive acts are not necessary; intention to accept may be inferred from such conduct as retaining possession of the deed, conveying or mortgaging the property, or otherwise exercising the rights of an owner."); *Riehl v. Bennett*, 142

So. 2d 761, 763 (Fla. Dist. Ct. App. 1962) ("Acceptance of a deed, however, may be inferred from such conduct as retaining possession of the deed, conveying the property, or otherwise exercising the rights of an owner. 16 Am.Jur., Deeds, § 154. Express assent on the part of the grantee is not necessary. 10 Fla.Jur., Deeds, § 104. Assent and ratification of acceptance may be inferred from conduct. Failure to renounce the deed after knowledge of its existence is sufficient to show acceptance. 16 Am.Jur., Deeds, § 159."); *Langman v. Alumni Ass'n of Univ. of Virginia*, 247 Va. 491, 499, 442 S.E.2d 669, 675 (1994) ("Acceptance on the part of the grantee is implied, because the conveyance is presumed to be beneficial, unless the grantee refuses to accept the deed by some act of renunciation, dissent, disagreement, or disclaimer. The question whether a grantee has accepted a deed is not determined by the presence or absence of the grantee's signature on the deed, but by factual evidence of the grantee's actions tending to prove either acceptance or renunciation of the conveyance.") (internal citations omitted).

Here, even assuming *arguendo* that South Carolina requires acceptance on the part of a grantee for a valid conveyance of real property, there is no genuine issue of material fact as to whether Appellant accepted the DIL. First, the DIL was drafted by Appellant's counsel, who requested that CPH execute and return it to him. Second, Appellant's counsel has retained the DIL for the past eight years, never attempting to return it to CPH or indicating until last year that the DIL was repudiated. Third, and perhaps most importantly, Appellant accepted possession of the Property at the same time CPH executed and delivered the DIL, and Appellant has retained possession of, made improvements to, and operated a car wash on the Property for the past eight years. Fourth, Mr. Howard, as the owner and manager of Appellant, admitted in his deposition that he believed he *did* own the Property from the time he took possession of the Property until this litigation became active nearly five years later, in 2016. Fifth, Appellant did not attempt to

foreclose on the Property for nearly five years after obtaining the DIL and possession of the Property. Sixth, during the five years following delivery of the DIL and possession of the Property to Appellant, Appellant never communicated to CPH that Appellant did not own the Property, or that CPH was the true owner of the Property, as Appellant now contends.

No court has ever found that a grantee did not accept delivery of a deed in circumstances even remotely resembling these. To the contrary, courts routinely find that grantees have validly accepted deeds under circumstances with facts less compelling than these. *See, e.g.*, *Langman*, 247 Va. At 499–501, 442 S.E.2d at 675–76 (finding the grantee Alumni Association accepted the deed where: "During the approximately 30 months between the date of execution of the deed on December 31, 1986, and August 1989, when controversy began regarding responsibility for the mortgage debt, the Alumni Association took no actions to resist the passage of title or to repudiate either the gift of real property or the debt connected with it. On the contrary, during this time period the conduct of Alumni Association demonstrated its acceptance of the conveyance."); *Riehl*, 142 So. 2d at 763 ("We think in the instant case the plaintiffs were put to an election at the time the recorded deed came to their attention. Their failure to notify the defendants within a reasonable time that they were not accepting the deed in full satisfaction of the contract is significant. In order to avail themselves of the rule in the Chace case, supra, they should have given notice and specified their intention to hold the defendants to the terms of the contract. Instead they accepted delivery by going into possession and making an ex parte resale of the property-acts of unqualified ownership. If the plaintiffs' theory were to be sanctioned, this would have the effect of foreclosing the defendants without due process of law. We hold that the plaintiffs in this case, having accepted the benefits of the deed, are estopped to hold the defendants to full performance of the contract.").

D. Appellant did not "repudiate" the DIL in January 2012 when the alleged condition precedent to acceptance of the DIL failed.

Appellant argues that a condition precedent to its acceptance of the DIL was Appellant's counsel resolving the subordinate lien held by the SBA. But the DIL says nothing about any condition precedent, nor does any other writing between the parties. Moreover, Appellant's counsel contends that he determined that he could not resolve the junior lien—and that the condition precedent to acceptance of the DIL had therefore failed—*in January 2012*. *See* July 17, 2018 H'rg Tr. at 21:2-12 (R. p. 651, lines 2-12). Appellant's counsel argued to the trial court that, in January 2012, upon the determination that the junior lien could not be resolved, "the delivery [of the DIL] is effectively repudiated." *Id.* at 21:12. (R. p. 651, line 12). The comments to the Restatement (Second) of Contracts state:

> In order to constitute a repudiation, a party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform. Mere expression of doubt as to his willingness or ability to perform is not enough to constitute a repudiation . . . .

Restatement (Second) of Contracts, § 250, *comment b.*

Here, in the more than four years between January 2012 and this litigation becoming active in late 2016, neither Appellant nor its counsel ever notified CPH (or anyone else) that the DIL was being repudiated or that any supposed condition precedent to the acceptance of the DIL had not been met; neither Appellant nor its counsel ever returned the DIL to CPH; and Appellant never returned possession of the Property to CPH. Rather, after the supposed "repudiation" in January 2012, Appellant continued to enjoy possession of the Property, operating a car wash on the Property continuously from late 2011 until the present. Moreover, Appellant did not seek to foreclose on the Property until 2016, which was more than *four years* after its supposed "repudiation" of the DIL. Finally, Mr. Howard, the sole owner of Appellant, testified in his

deposition that he believed that he *did* own the Property from the time he took possession in late 2011 until 2016 when this litigation became active. In sum, Appellant's assertion that it "repudiated" the DIL in January 2012 is not supported by any evidence in the record.

At the summary judgment hearing, the trial court asked Appellant's counsel whether any communication or other writing exists confirming that the DIL was merely being held in escrow or was being held subject to a condition precedent, and Appellant's counsel conceded that no such writing or communication exists. *See* July 17, 2018 H'rg Tr. at 23:2-21. (R. p. 653, lines 2-21). The trial court also asked Appellant's counsel why—if the DIL was "repudiated" in January 2012—Appellant did not seek to foreclose on the Property for more than four years after the supposed repudiation. *Id.* at 20:23– 21:12; 22:2–19. (R. p. 650, line 23 through R. p. 651, line 12; R. p. 652, lines 2-19). As recognized in the trial court's Order granting CPH summary judgment, "[Appellant] was unable to explain why the foreclosure languished for five years. The length of time that this case remained dormant demonstrates that [Appellant] did not intend to pursue the foreclosure and considered that it owned the property." *See* Order Granting Summ. J. at 7. (R. p. 046).

E. Under the doctrine of merger, Appellant is barred from foreclosing on the Property.

"When the holder of a mortgage acquires the equity of redemption or the legal title to the land merger will take place, unless the parties intend otherwise." *Thompson v. Hudgens*, 161 S.C. 450, 159 S.E. 807, 810 (1931). "The burden of overcoming the presumption in favor of merger rests upon him who denies that there was a merger; he must show by the preponderance of the evidence that it was the intention of the parties that there should be no merger." *Id.*

Here, Appellant has not come close to overcoming the presumption of merger. The DIL is unambiguous, was drafted by Appellant's counsel, and says nothing about an intention that there

be no merger. *See* DIL (R. pp. 362-363). Further, the DIL specifically states that "[t]he consideration for this deed is the satisfaction and cancellation of an indebtedness from the Grantor to the Grantee as evidenced by its mortgage" recorded in the Register of Deeds Office. *See id.* Moreover, Appellant has produced no agreement, email, notes, or any other writing or communication indicating that the parties intended that there be no merger. Also, the conduct of the parties is inconsistent with an intention that there be no merger. Under Paragraph 6 of the mortgage, upon a default by the mortgagor, all profits from the Property are assigned to reduce the balance of the mortgage. *See* Mortgage at 2. (R. p. 540). But Mr. Howard admitted in his deposition that he believed he owned the Property from 2011 until 2016, that he did not maintain separate records for Appellant's profits and expenses from the Property, much less apply these profits to the mortgage, Howard Dep. Tr. at 41: 23 to 42:4 (R. p. 329, line 23 through R. p. 330, line 4), and that he was not even aware of the provision in the mortgage requiring profits from the Property to be applied to the mortgage in the event of default. *Id.* at 44:15 – 45:13; 50:3-6 (R. p. 332, line 15 through 333, line 13). Finally, if the parties had intended that no merger occur, then Appellant presumably would not have waited five years to attempt to foreclose on its mortgage after receiving the DIL and accepting possession of the Property.

In its brief, Appellant argues that a question of fact exists as to whether it was merely a "mortgagee-in-possession" of the Property whose interests never merged, citing *May v. Jeter*, 245 S.C. 529, 536, 141 S.E.2d 655, 658 (1965) and *McCraney v. Morris*, 170 S.C. 250, 279, 170 S.E. 276, 279 (1933). But *May* and *McCraney* are easily distinguishable. In *May*, there was no executed deed from the grantor to the grantee—much less an unambiguous one drafted by the grantee's attorney—conveying title to the property, and the Court held that the grantor did not intend to pass title to the grantee because "neither the instrument itself, nor the circumstances surrounding its

execution show an intent on the part of [the grantor] to immediately pass to [the grantee] any estate or interest in the land." *May*, 245 S.C. at 541, 141 S.E.2d at 661 (finding that the grantor continued "to exercise all rights of complete ownership with respect to the property"). The facts of this case, as discussed above, could not be any more different.

In *McCraney*, the Court's ruling that there was no merger of interest was based upon its finding that Mrs. McCraney was misled by the grantor, who concealed the existence of a junior lien on the property. *McCraney*, 170 S.E. at 278 (finding that "[t]he facts as developed in the testimony in the cause . . . are convincing that [the grantee] was misled by the silence on the part of all three of them as to the fact that the [second] mortgage did exist"). Here, by contrast, it is undisputed that Appellant, through its counsel, was aware of the junior liens on the Property. *See, e.g.* Parker E-Mail dated Aug. 18, 2011 (R. pp. 212-213) (Parker providing contact information for the junior lienholders to Appellant's counsel two months before the execution of the DIL). In *McCraney*, the Court also based its ruling upon a finding that "setting aside of the transaction which has taken place, as to the conveyance of the property and the satisfaction of Mrs. McCraney's mortgage" would not cause any prejudice or loss to any other party. *Id.*, 170 S.E. at 280. But that is not the case here. CPH was induced to convey complete title to and possession of the Property to Appellant in exchange for the cancellation of the mortgage debt *see* DIL (R. pp. 362-363), and CPH has allowed Appellant to operate a car wash on the Property for the past eight years based on such reliance. If the Court were to set aside the conveyance of the Property and the satisfaction of the mortgage, as it did in *McCraney*, CPH would have lost eight years of enjoyment of, and the opportunity for profits from, a piece of commercial property. Further, for the past eight years, CPH has not taken steps to ensure that any mortgage debt (which CPH understood was satisfied in exchange for the DIL) is reduced by the profits made by Appellant from the Property.

And finding no merger of interest would increase the likelihood that the SGA would attempt to satisfy the debt owed to it by pursuing Parker pursuant to the personal guaranty, rather than satisfying the debt by foreclosing on its lien on the Property. Thus, this case is easily distinguishable from *McCraney*.

Because Appellant validly obtained title to the Property and has failed to create a genuine issue of material fact as to whether it can overcome the presumption of merger, the trial court did not err in granting summary judgment in CPH's favor.

II. South Carolina Rule of Civil Procedure 43(k) does not invalidate the DIL.

Appellant's primary argument on appeal is that the DIL is invalid and ineffective on the ground that it does not comply with South Carolina Rule of Civil Procedure 43(k) because it was not signed by Appellant and its counsel, but rather was signed only by CPH as the grantor. That is, Appellant argues that the law allows it to do the following: (1) have its attorney draft a DIL unambiguously stating that CPH is conveying "complete title" to the Property to Appellant, with no qualifications, and providing a blank for CPH as grantor to sign it but (as is customary with deeds) no blank for Appellant as grantee to sign it and no blank for Appellant's counsel to sign it; (2) request and receive an executed copy of this DIL from CPH at a time when Appellant was not even a party to the foreclosure litigation; (3) accept possession of the Property at the same time Appellant's counsel requested and received the DIL unambiguously conveying title; (4) maintain possession of and operate a car wash on the Property for eight years, with Appellant admittedly believing for the first five years that it owned the Property; and then (5) invalidate the DIL eight years after accepting possession of the Property solely because Appellant and its counsel never signed the DIL.

The law almost never assists a party in achieving such an inequitable result, and it does not do so here. Notably, the South Carolina Supreme Court has held:

> The law does not look with favor upon an attack upon an instrument involving the transfer or devolution of real estate because of mere informalities or slight irregularities connected with compliance with the statutory requirements of execution and attestation.

Hunt v. Smith, 202 S.C. 129, 24 S.E.2d 164, 166 (1943). Here, Appellant is seeking to invalidate an unambiguous document that its own counsel drafted—and Appellant is seeking to do so after it has enjoyed possession of and revenue from the Property for the past eight years—and Appellant is relying on a Rule of Civil Procedure governing "Conduct of Trial" that, upon information and belief, has never been applied to invalidate a conveyance of real property. The Court should reject Appellant's hyper-technical (and incorrect) argument for several reasons.

A. Rule 43(k) and the case law interpreting it.

South Carolina Rule of Civil Procedure 43 is entitled "Conduct of Trial." Its subsections govern, among other things, use of interpreters at trial (Rule 43(f)), reading pleadings to the jury during trial (Rule 43(g)), and opening and closing arguments during trial (Rule 43(j)). Rule 43(k), entitled "Agreements of Counsel," provides as follows:

> No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

Rule 43(k), SCRCP.

In *Ashfort Corp. v. Palmetto Const. Grp., Inc.*, 318 S.C. 492, 494, 458 S.E.2d 533, 535 (1995), the Supreme Court rejected appellants' argument "that Rule 43(k) is limited to agreements relating to evidentiary and trial matters, and is, therefore, inapplicable to settlement agreements."

After *Ashfort*, almost all reported cases interpreting or enforcing Rule 43(k) have been in the context of disputed settlement agreements. *See, e.g.*, *Widewater Square Assocs. v. Opening Break of Am., Inc.*, 319 S.C. 243, 245, 460 S.E.2d 396, 397 (1995) (applying Rule 43(k) in the context of a disputed settlement agreement); *Galloway v. Regis Corp.*, 325 S.C. 541, 544, 481 S.E.2d 714, 715 (Ct. App. 1997) (same); *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 726 (2006) (same); *Motley v. Williams*, 374 S.C. 107, 110, 647 S.E.2d 244, 246 (Ct. App. 2007) (same); *Vista Antiques & Persian Rugs, Inc. v. Noaha, LLC*, 425 S.C. 413, 417, 823 S.E.2d 179, 181 (Ct. App. 2009) (same). In discussing Rule 43(k), the Court of Appeals has emphasized "the importance of putting a settlement agreement on the record or immediately reducing the agreement to writing, and including in the writing all material terms and conditions of the agreement." *Galloway*, 325 S.C. at 546, 481 S.E.2d at 716-17. In *Ashfort* and many of the subsequent cases discussing Rule 43(k), the Court quotes a discussion from Corpus Juris Secundum regarding "stipulations" by counsel, which states that the purposes of rules such as 43(k) are:

> [T]o prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes, which it has been said are often more perplexing than the case itself. The time of the court should not be taken up in controversial matters of this character.

Ashfort Corp., 318 S.C. at 495, 458 S.E.2d at 535 (quoting 83 C.J.S. *Stipulations* § 4 (1953)).

B. Contrary to Appellant's assertions, CPH is not seeking to enforce a "settlement agreement."

In its brief, Appellant repeatedly mischaracterizes CPH's position as an attempt to enforce a "settlement agreement" between parties to litigation, and Appellant argues that the trial court erred because, in fact, no enforceable "settlement agreement" exists. *See, e.g.*, App. Br. at 3 ("Respondents contend that Appellant cannot foreclose on the Mortgage because Hill negotiated

with Respondents in 2011 a settlement agreement . . . .") (emphasis added); *id.* at 12 (referring to the "purported settlement agreement"); *id.* at 16 (referring to "the Purported Settlement Agreement"); *id.* at 18 ("Because the parties did not make a settlement agreement which is enforceable under Rule 43(k), SCRCP, all of Respondents' Motions should be denied, and this Action should be remanded for the trial of Appellant's foreclosure claims.") (emphasis added).[3]

But CPH is not alleging the existence of, or seeking to enforce, a settlement agreement, and the trial court did not hold that a settlement agreement existed. Rather, CPH contends, and the trial court held, that CPH validly conveyed title to real property via a DIL drafted by Appellant's counsel and executed and delivered by CPH. Because Appellant has title to the Property, the doctrine of merger bars Appellant from foreclosing on the Property.[4]

C. Rule 43(k) does not change the law governing the requirements for conveying real property.

Since time immemorial, the law has permitted the conveyance of real property via a deed signed by the grantor but not the grantee (much less the grantor's and grantee's counsel). *See, e.g.*, S.C. Code § 27-7-10 (prescribing the form for a valid deed and not requiring execution by grantee); *Farmers' Bank & Tr. Co. v. Fudge*, 113 S.C. 25, 100 S.E. 628, 631 (1919) (discussing the

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[3] Appellant refers to the purported "settlement agreement" or "settlement" at least thirty times in its brief.

[4] Appellant briefly argues that "Respondents waived any challenge to the applicability of Rule 43(k), SCRCP, by not raising the objection within ten days of the September 1 Hill Order," and because Respondents "litigated the case for nearly a year before challenging the applicability of Rule 43(k), SCRCP, *to their allegations of a settlement agreement*." App. Br. at 14 (emphasis added). Appellant cites no law in support of this argument. In any event, as explained above, CPH is not alleging the existence of a settlement agreement. The trial court's September 1 Order denying Appellant's motion to disqualify Hill as counsel addressed what would occur "[i]f CPH and Parker move to compel a purported settlement agreement." Sept. 1 Order, p. 4. But this contingency did not occur. In any event, the discussion of Rule 43(k) in the September 1 Order is dicta. *Nash v. Tindall Corp.*, 375 S.C. 36, 40, 650 S.E.2d 81, 83 (Ct. App. 2007) (holding that dicta is not binding).

formalities required for an effective deed and not requiring execution by the grantee); *Union City Realty & Tr. Co. v. Wright*, 138 Ga. 703, 76 S.E. 35, 35 (1912) (holding that property was validly conveyed even though the grantee did not sign the deed, and stating: "When [the grantee] received the deed from Harris containing this covenant, and took possession of the property conveyed, it became bound to him by such covenant."); *Messer v. Laurel Hill Assocs.*, 93 N.C. App. 439, 444, 378 S.E.2d 220, 224 (1989) ("The signature of the grantee is not required in order for a deed to constitute a valid conveyance."). In fact, in *Branton* (discussed above), the Supreme Court held that a deed was valid where the grantee did not even know it had received a deed (much less read or signed the deed). *See Branton*, 243 S.C. at 98-100, 132 S.E.2d at 288-90. As explained by the Supreme Court of Virginia:

> It remains true today that "[i]nnumerable deeds of conveyance . . . have been made, and are now on record in our courts, which have never been signed by the grantees, their acceptance being evinced only by taking possession and other acts in pais."

Langman v. Alumni Ass'n of Univ. of Virginia, 247 Va. 491, 500, 442 S.E.2d 669, 675 (1994) (internal citations omitted).

Appellant's argument—that the DIL is invalid because Appellant and its counsel did not sign it—seeks to fundamentally change the well-settled law governing the formalities required for a valid conveyance of real property. Under Appellant's argument, a deed is valid if it is signed by the grantor and two witnesses, *unless the conveyance of property affects pending litigation, in which case the grantor, grantee, and both their counsel must sign the deed.* This is not the law. Indeed, if Appellant were correct, every conveyance of real property that affected any litigation—regardless of whether the grantor and grantee were both parties to the litigation at the time of the conveyance, and regardless of how long the grantee had retained possession of the real property pursuant to the deed—would be subject to invalidation on the ground that the deed conveying the

real property was not signed by both the grantee and its attorney. Such a ruling would create a flood of litigation over the validity of conveyances of real property that had some impact on litigation.

In sum, the conveyance of the Property from CPH to Appellant via the DIL was not a "settlement agreement" or an "agreement between counsel," and Rule 43(k) therefore does not apply.

D. Even if Rule 43(k) did apply to conveyances of real property between parties to litigation, it would not apply here because Appellant was not a party to the litigation at the time of the conveyance.

Rule 43(k) imposes requirements for "agreements between counsel affecting proceedings in an action." It cannot reasonably be disputed that Rule 43(k) applies only to agreements between counsel *to the parties in the action whose proceedings are affected.* After all, Rule 43(k) requires any agreements subject to the Rule to be (1) "reduced to the form of a consent order or written stipulation signed by counsel and entered in the record"; (2) "made in open court and noted upon the record"; or (3) "reduced to writing and signed by the *parties* and their counsel" *See* Rule 43(k), SCRCP (emphasis added). Compliance with the Rule would be impossible for agreements between counsel who are not representing parties to the litigation.[5]

[5] Considering hypothetical examples illustrates the absurdity of applying Rule 43(k) to agreements between counsel who are not both counsel to parties to pending litigation. For example, if John Doe brings a lawsuit seeking to force Jane Smith to remove a fence she built on John Doe's property, and during the pendency of the lawsuit, John Doe, acting through his counsel, sells his property to a third party, who also is represented by counsel, the sale of the property would unquestionably affect the proceedings (Doe would no longer have standing as a plaintiff), but no court would find that Rule 43(k) invalidates the sale of the property between Doe and the third party. Or—to use an example outside the real estate context—if a plaintiff sued a defendant for breaching a contract requiring defendant to purchase widgets from plaintiff, and if plaintiff, during the pendency of the suit, sold the widgets to a third party, thereby mitigating his damages (and "affecting" the proceedings by reducing the damages that could be recovered), no court would find that Rule 43(k) invalidates the sale of the widgets to the third party. But accepting Appellant's

In this case, CPH conveyed the Property to Appellant via the DIL *prior to Appellant becoming a party to the foreclosure litigation.* It is undisputed that CPH executed the DIL and mailed it back to Appellant on October 24, 2011. *See* Parker Affidavit at 2; DIL; Parker Dep. Tr. 99:19-24 (App. to R.; R. pp. 362-363; R. p. 508, lines 19-24). Appellant did not become a party to this litigation until October 31, 2011. *See* Consent Order dated Oct. 31, 2011 (R. p. 006-009). Thus, even if Rule 43(k) applied to conveyances of real property, as Appellant contends, the Rule does not apply here because Hill was not counsel to a party to this litigation at the time of the conveyance.

E. Rule 43(k) does not apply for the additional reason that CPH was not represented by counsel for purposes of the negotiation and execution of the DIL.

Under its plain language, Rule 43(k) applies only to "agreements between counsel," and as discussed above, the Rule can only be reasonably interpreted to apply to agreements between counsel *who represent parties to pending litigation.* Here, the DIL was a conveyance of real property from CPH—who was not represented by counsel for purposes of the negotiation and execution of the DIL—to Appellant—who was represented by counsel but who was not a party to pending litigation. Because neither participant to the negotiation of the DIL was a counsel to a party in pending litigation, Rule 43(k) is doubly inapplicable. Appellant makes several arguments as to why the Court should pretend as though Rule 43(k) applies to agreements that are not between counsel. The Court should reject these arguments for the reasons discussed below.

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argument would require the Court to find that the agreements in these hypothetical examples are invalid.

i. The Court should not interpret "agreement between counsel" to mean "agreement between counsel, or agreement between two individuals who are not counsel."

Rule 43(k) refers to two categories of individuals: "counsel" and "parties." *See* Rule 43(k), SCRCP. An "agreement between counsel" must be memorialized in one of three ways, one of which is a writing "signed by the parties and their counsel." *Id.* Thus, the drafters of Rule 43(k) clearly knew how to distinguish, and did distinguish, between "counsel" and "parties." Moreover, the South Carolina Supreme Court has stated the following in the specific context of discussing the proper interpretation of Rule 43(k):

> Under our general rules of construction, the words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes.

Farnsworth v. Davis Heating & Air Conditioning, Inc., 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006) (internal quotations and citations omitted). The plain and ordinary meaning of "agreement between counsel" is *not* "agreement between counsel or agreement between those who are not counsel." Thus, the Court should follow the Supreme Court's holding in *Farnsworth* and reject Appellant's argument.

Ignoring the plain language of Rule 43(k) would be especially inappropriate in this case because doing so would have such an inequitable result—namely, it would allow Appellant to invalidate a DIL that its own counsel drafted and requested CPH execute, and it would allow Appellant to invalidate the DIL after Appellant has enjoyed ownership of and revenue from the Property for the past eight years. Moreover, it would be unfair for the Court to hold that CPH (and its manager Mr. Parker) should have divined that "agreement between counsel" in Rule 43(k) actually means "agreement between counsel or agreement not between counsel," especially where

no court has ever interpreted Rule 43(k) in this way, where no court has ever invalidated a deed based on Rule 43(k), where no court has ever invalidated an agreement where the only counsel involved did not represent a party to pending litigation, and where the validity of the DIL is being challenged by the party whose attorney drafted and requested that CPH execute the DIL.[6]

ii. The Court should reject Appellant's arguments relating to CPH's alleged unauthorized practice of law and "unclean hands" because they are not preserved and because they fail on the merits.

Appellant asks the Court to ignore the plain language of Rule 43(k) because, according to Appellant, CPH is attempting to benefit from its *pro se* participation in the foreclosure litigation. Similarly, Appellant argues that the Court should rule in its favor because CPH has "unclean hands" based on its unauthorized practice of law. The Court should reject these arguments for at least two reasons.

First, Appellant raised these arguments for the first time in its motion to reconsider; thus, these arguments are not preserved for appeal. *See Peterson v. Porter*, 389 S.C. 148, 152, 697 S.E.2d 656, 658 (Ct. App. 2010) ("While Peterson raised the employer-employee argument in his motion to reconsider, he failed to raise it during the summary judgment proceedings; therefore, it is not preserved."). Thus, the Court need not, and should not, reach the merits of these arguments.

Second, Appellant's arguments fail on the merits. Appellant is attempting to conflate, on the one hand, CPH's role in the foreclosure litigation prior to being represented by counsel—a role that was limited to merely filing an answer and counterclaim against BB&T on April 21, 2011—with, on the other hand, CPH's role in negotiating the DIL with Appellant's counsel and then

[6] Appellant argues that "[t]he absurdity of Respondents' position is apparent if the Court examines the situation that would exist if the parties' roles were reversed." App. Br. at 17. Appellant is incorrect. If Appellant had conveyed title to a piece of real estate to CPH via an unambiguous deed signed by Appellant, and if CPH had then taken possession of the property and operated a car wash on it for the past eight years, CPH would not expect a court to hold that CPH never received title to the property merely because CPH as grantee never signed the deed.

executing and delivering the DIL to Appellant's counsel, all of which occurred at a time when Appellant was a non-party to the foreclosure litigation. It is only the latter role that is relevant to this appeal. The fact that CPH filed an answer and counterclaim against BB&T several months before Appellant joined the litigation, and the fact that CPH did so without counsel of record, has no relevance whatsoever to this appeal. Rather, the relevant events for purposes of this appeal were CPH executing and delivering the DIL drafted by Appellant's counsel, and turning over possession to the Property to Appellant, none of which required CPH to be represented by counsel. *See* S.C. Code § 33-44-301(c) (providing that "any member of a member-managed company or manager of a manager-managed company may sign and deliver any instrument transferring or affecting the company's interest in real property").[7]

Appellant's reliance on this Court's opinion in *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010), *aff'd as modified*, 404 S.C. 421, 746 S.E.2d 35 (2013) is misplaced.[8] *See* App. Br. at 36. In *Coffey*, the Court applied the doctrine of unclean hands where Wachovia prepared mortgage-related documents without a lawyer and where the Court found that, by doing so, the borrower (Mrs. Coffey) suffered prejudice. This Court recognized that "[t]he doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation *to the prejudice of the defendant*." *Id.* (emphasis added).

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[7] Appellant argues that the prohibition on non-lawyers *preparing* deeds "should also extend to negotiation of instruments on behalf of limited liability companies resolving disputes related to notes and deeds." App. Br. at 38. Appellant cites no law in support of this assertion. In any event, to the extent Appellant contends the law prohibits a non-lawyer from *executing* a deed drafted by a lawyer, Appellant's contention is flatly contradicted by Section 33-44-301(c) of the South Carolina Code.

[8] As an initial matter, the Supreme Court affirmed this Court's holding in *Coffey* based on reasons unrelated to the unauthorized practice of law or unclean hands. Thus, it is unclear whether this Court's holding in *Coffey* regarding the unauthorized practice of law remains good law. In any event, the holding has no application here for the reasons discussed herein.

In its brief, Appellant ignores the critical requirement that the party asserting unclean hands suffer prejudice as a result of the other party's unclean hands. Here, CPH's filing of an answer and counterclaim against BB&T in April 2011—which is the only action CPH took in the foreclosure action without being represented by counsel—had no impact whatsoever on Appellant, and certainly did not prejudice Appellant. The conduct relevant to this appeal—CPH's execution and delivery of the DIL—does not constitute the unauthorized practice of law, and in any event, *Appellant* was represented by counsel who was fully aware he was negotiating the DIL with the managing-member of a limited liability company which was not represented by counsel. Allowing Appellant to have a lawyer negotiate a DIL with CPH, with full knowledge that CPH was not represented by counsel, and then invalidate the DIL eight years later on that basis, would be perverse and entirely inconsistent with the law of unclean hands.

In sum, even if Appellant's arguments regarding the unauthorized practice of law and unclean hands were preserved for appeal—which they unquestionably are not—they would fail on the merits.

III. The Court should reject Appellant's procedural and evidentiary objections because they are not preserved for appeal and because they fail on the merits.

Appellant makes several arguments relating to supposed procedural and evidentiary errors made by the trial court. *See generally* App. Br. at 18-30. These arguments primarily relate to the Court refusing to allow Allan Hill to provide testimony either at the summary judgment hearing or through an affidavit; refusing to allow Appellant to conduct additional discovery before ruling on summary judgment; and failing to give Appellant sufficient notice that the trial court would convert CPH's motion to dismiss into a motion for summary judgment. *See generally id.* These arguments are not preserved on appeal, and the Court therefore should not reach their merits. In any event, these arguments fail on the merits.

A. These arguments are not preserved on appeal.

Appellant did not raise any of these arguments until after the hearing where the trial court announced its ruling on the parties' motions and instructed counsel to prepare a proposed order. Thus, none of these arguments are preserved on appeal. *See, e.g.*, *In re Walter M.*, 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review."); *Peterson v. Porter*, 389 S.C. 148, 152, 697 S.E.2d 656, 658 (Ct. App. 2010) ("While Peterson raised the employer-employee argument in his motion to reconsider, he failed to raise it during the summary judgment proceedings; therefore, it is not preserved.").

Although CPH captioned its motion filed on April 5, 2017, as a "motion to dismiss," the motion stated that it would be supported by "discovery." *See* Motion at 1 (R. p. 100). On July 9, 2018, after the parties had over a year-and-a-half to conduct discovery, and pursuant to the briefing schedule set by the trial court, CPH filed a memorandum in support of its motion, captioning it as a "Memorandum of Law in Support of Motion to Dismiss or in the Alternative Motion for Summary Judgment." This memorandum made clear that CPH was seeking summary judgment, as CPH relied on documents outside the pleadings, including citations to deposition testimony. *See* Mem. Supp. and Exhibits (R. pp. 162-179). Appellant filed no memorandum in response to CPH's memorandum in support of its motion prior to the hearing, and at the hearing held on July 17, 2018, Appellant made no objection to the trial court converting CPH's motion to dismiss into a motion for summary judgment; made no objection to the amount of notice Appellant received for the hearing; made no request for a continuance; did not seek to introduce additional evidence or take additional discovery before the Court ruled on the motions; and did not object to the Court ruling before Appellant had the opportunity to conduct additional discovery or submit additional evidence. *See generally* July 17, 2018 H'rg Tr. (R. pp. 631-661). To the contrary, Appellant

implied that the parties did *not* need to conduct any additional discovery. *See id.* at 8:4 – 6 (R. p. 638, lines 4-6) (Appellant's counsel stating: "At this point we have had two (2) years of delay, reams of paper in discovery all day depositions, motions, and status conferences and they still have not produced a written agreement."). Further, the trial court gave all counsel the opportunity to argue for as long as they would like. *See id.* at 27:21-22 (R. p. 657, lines 21-22) (the trial court asking the parties if they have any further arguments before the trial court rules and Appellant's counsel stating: "Nothing further from the Plaintiff, Your Honor.").

Moreover, although Appellant implies that it attempted to introduce testimony from Allan Hill at the summary judgment hearing and was prohibited from doing so by the trial court, the transcript refutes this implication. In fact, at the hearing, Appellant's counsel only sought to allow Mr. Hill to respond as counsel of record to an argument made by CPH's counsel regarding the personal guaranty signed by Mr. Parker—an issue not even addressed in the affidavit from Mr. Hill that Appellant now argues the trial court should have considered.

In its brief, Appellant references the exchange between the trial court and Appellant's counsel on page 23 of the transcript, and then states that "[t]he trial court did not afford Appellant any opportunity to supplement that record." App. Br. at 20. But this is the exchange referenced by Appellant:

> THE COURT: Is there anything that has been produced that indicates following the delivery of the deed in lieu to Mr. Hill as far as the conditions of his holding the deed or additional requirements of closing and certifications that you are talking about? I haven't seen any of that. I just want to make sure that I am not missing it.
> MR. LEGRAND: I don't think there was.
> THE COURT: There was nothing further after the delivery of the deed.
> MR. LEGRAND: I don't think that there was any other letters of communications because he was working with the SBA or trying to communicate.
> THE COURT: But there is nothing in the documents that have been submitted?
> MR. LEGRAND: No. You are talking about between Mr. Hill and Walt Parker or somebody connected - - -
> THE COURT: Right.
> MR. LEGRAND; I don't think that there is any thing.
> THE COURT: Something that says I have received your deed and I am holding it in escrow pending my working something out with the SBA or I also need the certifications of the corporation or LLC to determine if you have the right - - -
> MR. LEGRAND: No.
> THE COURT: So there is nothing as far as that is concerned?
> MR. LEGRAND: No, Your Honor.
> THE COURT: All right. Counsel.

July 17, 2018 H'rg Tr. at 23:2-21 (R. p. 653, lines 2-21). Later in the hearing, CPH's counsel disputes Appellant's counsel's assertion that allowing the foreclosure to occur would "leave us right back where this case should have been in the fall of 2012," arguing that, in fact, allowing the foreclosure to go forward would be prejudicial to Mr. Parker because it would likely result in the SBA pursuing Parker for a personal guaranty he signed. *Id.* at 25:7-22 (R. p. 655, lines 7-22). In response to this argument regarding the personal guaranty, Appellant's counsel, Mr. LeGrand, asks: "Your Honor, could Mr. Hill be allowed to make a final comment for the Plaintiff?" *Id.* at 25:23-24 (R. p. 655, lines 23-24). Counsel for CPH objects to Mr. Hill testifying as a witness, and

Mr. LeGrand responds that Mr. Hill "is an attorney of record" and "an officer of the court" and "can answer perhaps some of the comments and arguments made by the Defendants." *Id.* at 26:6-8 (R. p. 656, lines 6-8). The trial court notes that the parties are present on the motions and not an evidentiary hearing and then asks whether the purpose of Mr. Hill speaking "would be to introduce evidence or make arguments." *Id.* at 26:9-11 (R. p. 656, lines 9-11). At that point, Mr. Hill asks the trial court if he can confer with Mr. LeGrand, and says: "*I can tell Mr. LeGrand what we were talking about and you will not have to get into what I say or don't. It is just with regard to what she just last said.*" *Id.* at 26:12-13 (R. p. 656, lines 12-13) (emphasis added). As noted, the last argument CPH's counsel made was related to the personal guaranty signed by Mr. Parker. At that point, the trial court allows everyone to a break, and when they return, Mr. LeGrand responds to CPH's counsel's point regarding the personal guaranty. *See id.* at 26:25 – 27: 13 (R. p. 656, line 25 through R. p. 027, line 13). Notably, at no point during the hearing did Appellant's counsel argue that Mr. Hill should be permitted to submit additional evidence, via live testimony or via affidavit. At the end of the hearing, after confirming that none of the counsel had any further arguments, the Court announced its ruling and the reasoning for its ruling and requested that counsel prepare a proposed order. *See id.* at 27:25 – 29:8 (R. p. 657, line 25 through R. p. 659, line 8).

On September 7, 2018—more than a month-and-a-half after the trial court announced its ruling and its rationale for its ruling, but before the trial court issued its Order—Appellant, without seeking or obtaining leave of court, filed a document captioned "Plaintiff's Submission of Affidavit of Counsel." *See* Pl. Sub. dated Sep. 7, 2018 (R. pp. 699-700). In this submission, Appellant did not argue that the trial court failed to provide sufficient notice of the summary judgment hearing or object to the conversion of the motion to dismiss to a motion for summary

judgment; did not argue that the trial court should have provided additional opportunities for discovery or submission of evidence; and did not argue that the trial court should have permitted Mr. Hill to testify or submit an affidavit at or before the summary judgment hearing. *See id.* This submission, which was not made until more than fifty (50) days after the summary judgment hearing where the trial court announced its ruling and the rationale for its ruling, was untimely. *See* Rule 56(c), SCRCP (providing that a party opposing a motion for summary judgment "may serve opposing affidavits not later than two days before the hearing").

In its Motion to Reconsider filed on October 8, 2018, Appellant raised for the first time its various procedural objections which Appellant now seeks to argue on appeal, including its objections to the trial court converting CPH's motion to a motion for summary judgment; a lack of sufficient notice of the hearing; a lack of an opportunity to submit additional evidence; and a failure of the trial court to consider Mr. Hill's affidavit submitted more than fifty days after the Court announced its ruling on summary judgment and its reasoning for such ruling. *See* Mot. Reconsider, dated Oct. 8, 2018 (R. pp. 220-228). Thus, none of these arguments is preserved on appeal. *Peterson*, 389 S.C. at 152, 697 S.E.2d at 658 ("While Peterson raised the employer-employee argument in his motion to reconsider, he failed to raise it during the summary judgment proceedings; therefore, it is not preserved.").

B. These arguments fail on the merits.

Even if Appellant had preserved these arguments on appeal, they would fail on the merits. As Appellant concedes, "the trial court's admission or exclusion of evidence is subject to an abuse of discretion standard." App. Br. at 18. Aside from arguing that Appellant should have been permitted to submit the affidavit of Mr. Hill, Appellant never identifies what additional evidence it should have been permitted to submit, what additional discovery it possibly could have needed to do, or why having additional time before the summary judgment hearing would be expected to

change the outcome. Moreover, even if Appellant had submitted Mr. Hill's affidavit in a timely fashion, the trial court would not have abused its discretion by failing to consider it. And, even if the trial court had considered Mr. Hill's affidavit, it does not provide a basis to deny CPH's motion for summary judgment.

Mr. Hill's affidavit is highly unusual. It is twenty-three paragraphs, and *the entire affidavit* is comprised of quotes from the following: an Order issued by the Court on September 1, 2017; a memorandum of law filed by Appellant on July 9, 2018; a memorandum of law filed by Appellant on August 11, 2017; and the transcript of the summary judgment hearing on July 17, 2018. *See generally* Hill Affidavit (R. pp. 701-706). In its appellate brief, Appellant fails to explain how quotes from memoranda previously filed with the Court, an Order of the Court, and a transcript of a hearing—all of which are materials the Court had before it in ruling on CPH's motion for summary judgment—could possibly create a genuine issue of material fact to defeat summary judgment.

South Carolina Rule of Civil Procedure 56(e) sets forth the required form for affidavits submitted in opposition to motions for summary judgment and requires that they "be made on personal knowledge" and "set forth such facts as would be admissible in evidence." Rule 56(e), SCRCP. Further, not only does Rule 56(e) require the facts in an affidavit opposing summary judgment to be "admissible"; it also requires that they be "specific facts showing there is a genuine issue for trial." *Id.* Mr. Hill's affidavit, however, fails to set forth any specific facts, much less specific facts in an admissible form. *See generally* Hill Affidavit. (R. pp. 701-706). For example, the affidavit quotes the portion of the trial court's September 1, 2017 Order that states that "Super Suds contends" that the DIL was delivered to Hill "in trust" and that Hill is holding the DIL "in trust." Hill Affidavit, ¶ 1 (R. p. 701). Likewise, the affidavit quotes Appellant's memorandum that

asserts, without any support, that in 2011 the parties agreed that [CPH] would execute a DIL to be held in trust while [Appellant] tried to negotiate lien releases with the subordinate lienholders." *Id.* at ¶ 8 (R. pp. 702-703). But these are the same arguments—devoid of any factual support—that were before the trial court on July 17, 2018. As shown in the block quote included above, the trial court asked Appellant's counsel on several occasions if Appellant had any *evidence* supporting the *arguments* included in the Hill Affidavit, and Appellant's counsel conceded that Appellant did not. *See* July 17, 2018 H'rg Tr. at 23:2-21 (R. p. 653, lines 2-21).

The law is well-settled that the quotes in the Hill Affidavit—even if the Affidavit had been submitted timely and in compliance with Rule 56(e)—cannot create a genuine issue of material fact for purposes of summary judgment. On summary judgment, "where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record." *Cobb v. Benjamin*, 325 S.C. 573, 581, 482 S.E.2d 589, 593 (Ct. App. 1997); *see also Trivelas v. S.C. Dep't of Transp.*, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001) ("Arguments of counsel are not evidence, and absent stipulation, they do not provide a factual basis for summary judgment."). Here, Mr. Hill simply took portions of memoranda and Orders filed with the trial court and statements from counsel during oral arguments and copied and pasted them into an affidavit. Thus, these statements cannot defeat summary judgment. Moreover, "[a] conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment." *Shupe v. Settle*, 315 S.C. 510, 516–17, 445 S.E.2d 651, 655 (Ct. App. 1994). The statements in Mr. Hill's affidavit are unquestionably "conclusory statement[s] as to the ultimate issue," and they therefore are not sufficient to create a genuine issue of material fact.

Finally, the DIL, which Appellant's counsel drafted, unambiguously conveys "complete title" to the Property from CPH to Appellant, and it says nothing about any condition precedent. As explained above, the Court may not look beyond the four corners of a deed to determine the parties' intent where the deed is unambiguous. Here, Appellant does not even argue that the DIL is ambiguous. Thus, Appellant could not have created a genuine issue of material fact by doing more discovery or submitting additional evidence, regardless of what that discovery or evidence might have been.

For all of these reasons, Appellant's procedural and evidentiary objections would fail on the merits, even if they had been preserved on appeal.[9]

IV. The trial court's ruling may be affirmed on the additional sustaining grounds that Appellant's arguments are barred by equitable estoppel and laches.

As the prevailing party below, CPH may assert additional grounds to sustain the ruling below, even if those grounds were not raised to or relied on by the court below. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); *I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("Under the present rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, *regardless of whether those reasons have been presented to or ruled on by*

[9] Appellant briefly argues that the trial court, in granting CPH summary judgment, may have relied in part on a statement made by counsel during a status conference. App. Br. at 35. Appellant bases this argument on a comment made by the trial court during the hearing on Appellant's motion to reconsider. *Id.* at 34. Specifically, the trial court mentioned during the hearing on the motion to reconsider that someone said during a hearing or a status conference that Appellant is not able to create an accounting of the profits from the car wash on the Property because Appellant did not keep the profits for that car wash separate from the other car washes. *See id.* Appellant's argument is puzzling because Mr. Howard admitted in his deposition that he did not segregate the revenues and expenses of the car wash on the Property from those of his other car washes, but rather he commingles these amounts. *See* Howard Dep. Tr. at 41:23 – 42:4; 45:14 – 48:5 (R. p. 329, line 23 through 330, line 4; R. p. 333, line 14 through 336, line 5).

the lower court.") (emphasis added); *see also* J. Toal, *et al.*, *Appellate Practice in South Carolina* 62 (2d ed. 2002) (same). Here, the trial court's ruling may be affirmed on the additional grounds of equitable estoppel and laches.

A. Appellant's arguments are barred by the doctrine of equitable estoppel.

The law of equitable estoppel is as follows:

> The essential elements of equitable estoppel are divided between the estopped party and the party claiming estoppel. The elements of equitable estoppel as related to the party being estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. The party asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped.

Strickland v. Strickland, 375 S.C. 76, 84–85, 650 S.E.2d 465, 470 (2007) (internal citations omitted).

Each of these elements is satisfied. First, the conduct of Appellant unquestionably conveyed the impression to CPH that Appellant accepted title to the Property in exchange for cancelling the indebtedness on the mortgage. Appellant's counsel drafted the DIL unambiguously stating that CPH was conveying "complete title" to Appellant in exchange for cancellation of indebtedness and requested that CPH execute and return the DIL; CPH executed and delivered the DIL, and Appellant never returned it; and Appellant accepted possession of the Property, and made improvements to and operated a car wash on the Property for eight years. Appellant also did not seek to foreclose on the mortgage for approximately five years after accepting possession of the Property and the DIL. Appellant certainly would have expected and intended for CPH to know of,

and act upon, its conduct. And, to the extent Appellant did not, in fact, have title to the Property because Appellant's counsel was holding the DIL "in trust" for all of those years, Appellant had constructive knowledge of this fact through its counsel.

Further, no evidence in the record shows how CPH could have known that it did not, in fact, convey title to the Property to Appellant when it executed and delivered the DIL and Appellant accepted possession of the Property and operated a car wash on it for eight years. Also, CPH unquestionably relied upon the conduct of Appellant to its prejudice. CPH has not attempted to exercise control over the Property or generate revenue from the Property during the past eight years. Appellant now contends that CPH has been the owner of the Property for the past eight years and that the debt on the mortgage purchased by Appellant has been steadily increasing, unbeknownst to CPH. *See* App. Resp. Mot. Amend, dated Aug. 11, 2017, at 2 (R. p. 210) (Appellant asserting that "the debt owed to [Appellant by CPH] now exceeds $700,000"). If CPH had known that it owned the Property for all of these years, it could have been using the Property to run its own car wash—or to otherwise generate income from the Property—and to pay down the mortgage debt. It would be fundamentally unfair for Appellant to be permitted to argue that it never received title to the Property after all of these years of running a car wash on the Property.

B. Appellant's arguments are barred by the doctrine of laches.

The law of laches is as follows:

> Laches is an equitable doctrine defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). In order to establish laches as a defense, a defendant must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the defendant. Kelley v. Kelley, 368 S.C. 602, 606, 629 S.E.2d 388, 391 (Ct.App.2006).

Strickland, 375 S.C. at 83, 650 S.E.2d at 469.

The doctrine of laches applies for essentially the same reasons the doctrine of equitable estoppel applies. Appellant asserts that it "repudiated" the DIL in January 2012 when its counsel determined that he could not resolve the junior lien of the SBA. But neither Appellant nor its counsel mentioned this "repudiation" to CPH for more than four years. Appellant did not seek to foreclose on the Property and, as recognized by the trial court, "[Appellant] was unable to explain why the foreclosure languished for five years" when asked by the trial court. Summ. J. Order at 7 (R. p. 046). Thus, Appellant unreasonably delayed asserting its rights, and CPH was prejudiced by this delay for the reasons explained above. Thus, Appellant's arguments are also barred by laches.

V. Conclusion

For the foregoing reasons, Respondents respectfully request that this Court affirm the trial court's Order granting summary judgment in their favor.

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Charleston, South Carolina

December 20, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Gordon G. Cooper, Master-in-Equity

Trial Court Case No. 2011-CP-42-0500

Appellate Case No. 2019-000404

Super Suds, LLC, ... Appellant,

v.

Carolina Properties Holdings, LLC and Walter W. Parker, IV, The United States of America by and through the U.S. Small Business Administration, Carolina Clean Greer I, LLC, and Community Development and Improvement Corporation, ... Defendants,

Of whom

Carolina Properties Holdings, LLC, and Walter W. Parker, IV are ..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR.

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