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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Charleston County
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge
Mikell R. Scarborough, Circuit Court Judge

Case No. 2016-CP-10-02955
Appellate Case No. 2021-000272

TCC of Charleston, Inc.,

Appellant/Respondent,

v.

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

Respondents,

Of which Concord & Cumberland HPR is the

Respondent/Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

- I. Is the Master's unappealed finding and conclusion that the Appellant filed and sued upon a lien for work performed on or before March 17, 2016, the law of the case requiring affirmance of the Master's Order?

- II. Was the Master correct in granting Mrs. Beatty's Motion for Summary Judgment on the Appellant's cause of action for foreclosure of mechanic's lien for the following reasons:
 - a. The Appellant is bound by its attestations in its two verified complaints swearing that the date of last work or furnishing of materials was March 17, 2016.
 - b. The Appellant is bound by its attestations in its two verified statements of account swearing that the date of last work or furnishing of materials was March 17, 2016.
 - c. The Appellant's lien dissolved by operation of law because it was untimely served on Respondent on June 22, 2016, the ninety-seventh (97th) day after March 17, 2016.
 - d. Where the lien and verified pleadings filed by the Appellant in Mrs. Beatty's chain of title clearly demonstrate that the Appellant failed to serve its mechanic's lien upon her within ninety (90) days as required by S.C. Code Ann. § 29-5-90 (1976), the necessity of reliance upon public record and the need for title examiners to rely upon those records to determine whether the lien remains viable and subsisting at the time of examination prohibits amendment of the date of last furnishing labor or materials to a later date after the lien has dissolved.

- III. Did the Master properly award attorney's fees to Respondent as the prevailing party?

INTRODUCTION

The Appellant, TCC of Charleston, Inc. ("TCC"), filed its Verified Complaint on June 6, 2016, seeking payment in the amount of \$2,385,503.57 for labor and materials provided on or before March 17, 2016 to the Concord & Cumberland Horizontal Property Regime (the "HPR"). The Appellant asserted a mechanic's lien for that work as well. Apparently realizing that it could not assert a lien against the HPR, the Appellant amended its complaint to add as a defendant each of the

owners of the condominium units managed by the HPR, including Mrs. Betty Beatty (“Mrs. Beatty”). In the Amended Verified Complaint, the Appellant sought to collect for the same labor and materials supplied no later than March 17, 2016. The Appellant’s lien and verified statements of account were filed with the Register of Deeds on June 10, 2016, thereupon creating a cloud upon Mrs. Beatty’s title.

A mechanic’s lien arises inchoate when labor is performed or material is furnished; however, the lien dissolves by operation of law if it is not perfected in the manner and within the time limitations imposed by the Mechanic’s Lien Statute. S.C. Code Ann. §§ 29–5–10 to 440 (1976). Mechanic’s liens are creatures of statute, and the procedures for enforcing a mechanic’s lien must be strictly followed. Courts are not at liberty to depart from the plain meaning of the language contained in the mechanic’s lien statutes. In order to perfect a mechanic’s lien and prevent its dissolution, TCC was required to file and *serve* the lien upon Mrs. Beatty on or before June 15, 2016, the ninetieth (90th) day after March 17, 2016. TCC timely filed its lien but missed the deadline to serve Mrs. Beatty. She was served on June 22, 2016. **R_____** (June 22, 2016 Affidavit of John R. Gamble). Therefore, the lien dissolved by operation of law.

The Appellant, TCC of Charleston, Inc. (“TCC”), brought this action to enforce a mechanic’s lien for work performed on or before March 17, 2016. TCC filed two (2) verified complaints attesting under oath that “the last day of such furnishing materials and services was March 17, 2016.” **R_____** (TCC’s Verified Complaint ¶ 9 & Verified Amended Complaint ¶ 10). In addition, TCC filed of record two (2) sworn statements of account, each attesting that the last day work was performed or materials provided to the property was March 17, 2016. **R_____** (TCC’s Verified Complaint Exhibit “A” Verified Statement of Account & Verified Amended Complaint Exhibit “A” Verified Statement of Account). The second sworn statement of account, dated June 10, 2016, was attached as Exhibit

“A” to TCC’s Verified Amended Complaint and was also filed in the Office of the Register of Deeds in Book 0560, Page 116. **R_____** (TCC’s Verified Amended Complaint Exhibit “A” Verified Statement of Account & R.O.D. Book 0560, Page 116). TCC further swore under oath in Paragraph 12 of its Initial Verified Complaint and Paragraph 14 of its Amended Verified Complaint “[t]hat Plaintiff has completed its work and has demanded payment for the balance due on its contract from the Defendants.” **R_____** (TCC’ Verified Complaint & Verified Amended Complaint).

The Verified Amended Complaint and the June 10, 2016 statement of account were served upon Mrs. Beatty on June 22, 2016, the *ninety-seventh* (97th) day after March 17, 2016. TCC’s lien dissolved by operation of law before it was served upon Mrs. Beatty, because TCC failed to file and *serve* the lien within ninety (90) days as required under § 29–5–90.

On February 16, 2021, the Master granted Mrs. Beatty’s motion for summary judgment and awarded her attorney’s fees in the amount of \$75,000.00 in fees and costs in the amount of \$1,000.00. **R_____** (Judge Scarborough’s February 16, 2021 Summary Judgment Order) The Master correctly ruled, as a matter of law, that TCC’s lien expired before it was served upon Mrs. Beatty. **R_____** (Judge Scarborough’s February 16, 2021 Summary Judgment Order at 14–15) The Master based his ruling upon four (4) grounds: 1) TCC sued upon and sought to enforce a lien for work performed on or before March 17, 2016 which dissolved on June 16, 2016; 2) TCC swore under oath on four (4) different occasions that the work was performed on or before March 17, 2016, such that TCC was bound by its sworn testimony; 3) TCC could not retroactively contradict these sworn statements of record where title abstractors have a right to rely on them, and 4) there is no provision in the law authorizing a lien claimant to alter or amend a date of last work within the claimant’s filed, and recorded, sworn statement of account. **R_____** (Judge Scarborough’s February 16, 2021 Summary Judgment Order at 12–15; 13–14; 11–12).

Having ruled that TCC's lien dissolved before it was served upon her, the Master determined that Mrs. Beatty was the "prevailing party" in the mechanic's lien dispute and awarded \$75,000.00 in reasonable attorney's fees and \$1,000.00 in costs pursuant to § 29-5-10. **R_____** (Judge Scarborough's February 16, 2021 Summary Judgment Order at 15-17). TCC expressly waived a hearing on the quantum of fees awarded to Mrs. Beatty. **R_____** (Atty Epting's February 26, 2021 email to Judge Scarborough). TCC's counsel wrote the Master ten (10) days after the order awarding fees and costs to Mrs. Beatty was filed, stating, in pertinent part, the following:

"Judge, Cordes mentioned a hearing on quantum of fees at one time and do not know your thinking in light of the path we are on. I write only to out-scoop "Scoup Jackson" who late one night on the Senate floor said — "everything that can be said on this subject has been said, but not by me." We refrain, if you need us to say more, then let us know. Have a good weekend.

R_____ (Atty Epting's February 26, 2021 email to Judge Scarborough).

TCC appealed the Master's February 16, 2021 Order on March 11, 2021. **R_____** (TCC Notice of Appeal). The next day—and twenty-four days after the Master's Order—TCC filed a motion for reconsideration pursuant to Rules 59(e), 60(a), and 60(b), SCRPC without seeking or obtaining leave from this Court. **R_____** (TCC's Motion for Reconsideration and/or Clarification). In that motion, TCC sought to "review and challenge the entries or the relatedness of the entries to the lien foreclosure action" and demanded that the Master review *in camera* "each time entry and the itemized costs to determine the reasonableness of the time entered and the costs incurred." **R_____** (TCC's Motion for Reconsideration and/or Clarification at 4). TCC stated in the second paragraph of its motion that the basis for it was "so that the appellate court may have a clear record before it" **R_____** (TCC's Motion for Reconsideration and/or Clarification at 2). The Master ruled that TCC's Rule 59(e) motion was untimely as to Mrs. Beatty. **R_____** (Judge Scarborough's

March 26, 2021 Order Denying TCC's Motion for Reconsideration). Thus, no matters or issues TCC sought to be reconsidered in that motion have been preserved for review by this Court.

The Master properly ruled that TCC is bound by the numerous sworn statements it filed of record in both the Court of Common Pleas and the Office of the Register of Deeds each of which unequivocally attested that the lien it sought to foreclose was for work performed on or before March 17, 2016. Where, as here, a lien claimant chooses to include a date of last work in a sworn statement of account and thereafter files that statement of record where it becomes a part of the Defendant's chain of title, the lien claimant is bound by that date. Public confidence and reliance upon sworn public records mandates this result. The Master recognized this mandate and followed the precedent of the appellate courts of South Carolina and our sister state of North Carolina, whose precedent on this issue has been cited by this Court in *Preferred Sav. & Loan Ass'n, Inc. v. Royal Garden Resort, Inc.*, 295 S.C. 268, 273, 368 S.E.2d 78, 81 (Ct. App. 1988), *aff'd*, 301 S.C. 1, 389 S.E.2d 853 (1990).

STATEMENT OF THE CASE

Mrs. Beatty is a resident of the Concord & Cumberland condominium complex located at 175 Concord Street in Charleston, South Carolina. The complex is governed by the HPR. In early 2014, the HPR hired TCC to address significant exterior construction defects. By early 2016, the working relationship between the HPR and TCC had broken down over a payment dispute. Thereafter, TCC filed this suit. The case proceeded as follows until the Master granted summary judgment to Mrs. Beatty on February 16, 2021:

I. TCC'S LIEN, VERIFIED COMPLAINTS, AND SWORN STATEMENTS OF ACCOUNT.

TCC originally filed suit against only the HPR, filing its Summons, Verified Complaint, Notice and Certificate of Mechanic's Lien, Statement of Account, and Motion to Stay and Compel Arbitration on June 6, 2016. **R_____** (TCC's Verified Complaint). TCC filed a *Lis Pendens* on June

10, 2016. **R_____**(TCC's *Lis Pendens*). In its Verified Complaint and attached sworn Statement of Account TCC swore that it last furnished labor or materials on March 17, 2016. **R_____**(TCC's Verified Complaint). That Verified Complaint asserted claims against the HPR only. The Verified Complaint, in paragraph 9, reads as follows:

9. That in accordance with their agreements the Plaintiff furnished the agreed-upon material and services to the Defendants which were used in the work, and on related structures on the subject property, that material and services improved the property, and *the last date of such furnishing materials and services was March 17, 2016.*

R_____(TCC's Verified Complaint) (emphasis added). TCC's president, John David Griffith, verified the Complaint by VERIFICATION dated May 19, 2016. **R_____**(TCC's Verified Complaint) In the Verification, Mr. Griffith swore under oath that he was an officer of TCC, and that he had been authorized by TCC to make the verification. **R_____**(TCC's Verified Complaint). As to the facts of the Verified Complaint, he swore to the following:

"... I have read the foregoing Complaint and know the contents thereof and that based upon my own personal knowledge, the facts therein are true and correct."

R_____ (TCC's Verified Complaint). TCC's president also swore to the date of last work in TCC's Statement of Account attached to the Complaint as Exhibit "A". **R_____** (TCC's Verified Complaint). In paragraph 4 of Exhibit "A", TCC's president, Mr. Griffith, swore under oath to the following:

4. That the last day work was performed or materials provided to the property described in EXHIBIT B was March 17, 2016.

R_____(TCC's Sworn Statement of Account dated May 19, 2016).

Apparently realizing that it could not enforce a mechanic's lien against the HPR under South Carolina Law, TCC filed an Amended Summons and Amended Verified Complaint, Amended

Notice and Certificate of Mechanic's Lien and Amended Statement of Account adding as defendants each unit owner, including Mrs. Beatty, on June 10, 2016. **R___**(TCC's Amended Summons and Verified Complaint, Amended Notice and Certificate of Mechanic's Lien and Amended Statement of Account). An Amended *Lis Pendens* was filed on June 16, 2016. **R___**(TCC's Amended *Lis Pendens*). In its Amended Verified Complaint and Statement of Account, TCC realleged—under oath—that March 17, 2016 was the date of last furnishing labor or materials. **R___**(TCC's Verified Amended Complaint & Exhibit "A" Verified Statement of Account). Paragraph 10 of the Amended Complaint contains the identical language which is quoted above as paragraph 9 of the original Complaint, alleging that "[T]he last date of such furnishing of materials and services was March 17, 2016." **R___**(TCC's Verified Amended Complaint).

Mr. Griffith, TCC's president, on June 10, 2016, again verified the Amended Complaint, attesting unequivocally that "[B]ased upon my own personal knowledge, the facts as alleged therein are true and correct." **R___**(TCC's Verified Amended Complaint). This was the *third* sworn attestation under oath that March 17, 2016 was the date TCC ceased work. TCC attached to its Amended Complaint as Exhibit "A", a second sworn statement of account dated June 10, 2016, and signed by its president, Mr. Griffith. **R___**(TCC's Verified Amended Complaint Exhibit "A" Verified Statement of Account). This was TCC's *fourth* sworn attestation under oath that March 17, 2016 was the date it ceased work. None of these four (4) statements mention or use the term "substantial completion." Rather, the original Verified Complaint at Paragraph 12 and the Amended Verified Complaint at Paragraph 13 attest that "Plaintiff has completed its work and has demanded payment for the balance due on its contract from the Defendants." **R___**(TCC' Verified Complaint & Verified Amended Complaint).

II. SERVICE OF THE LIEN ON MRS. BEATTY

Mrs. Beatty was served on June 22, 2016 with the Amended Complaint, the Amended Notice and Certificate of Mechanic's Lien, the June 10, 2016 second Statement of Account, and the Amended *Lis Pendens* via process server. **R____** (June 22, 2016 Affidavit of John R. Gamble). The letter addressed to her from TCC's counsel to Beatty is dated June 21, 2016. **R____** (June 21, 2016 Letter from Atty Epting). Both the May 19, 2016 and June 10, 2016 sworn statements of account were filed with the Court of Common Pleas. The June 10, 2016 sworn Statement of Account was filed in Book 0560, Page 116, of the Register of Deeds where it became a cloud upon Mrs. Beatty's title. **R____** (Amended Notice and Certificate of Mechanic's Lien).

III. PROCEEDINGS BEFORE THE ARBITRATION PANEL

This case was stayed by Order of the Honorable Roger M. Young dated January 2, 2017, to allow TCC's contract claims to proceed to arbitration as required by the terms of the contract between TCC and the HPR. **R____** (Judge Young's January 2, 2017 Order Staying the Case). Mrs. Beatty did not participate individually in the arbitration, as she was not a party to the contract.

The merits hearing was conducted before the Arbitration Panel (the "Panel") from January 21–24, 2019. **R____** (Arbitration Award). On April 16, 2019, the Panel entered its Arbitration Award in favor of TCC, which it subsequently corrected, issuing a Corrected Arbitration Award on August 12, 2019. **R____** (Arbitration Award and Corrected Arbitration Award). In both awards, the Panel declined to award attorney's fees, because the parties' contract contained no provision for fees, and the Horizontal Property Act., S.C. Code Ann. § 27–31–230 (1976) prohibits mechanic's liens against the HPR, which was the only defendant in the arbitration. **R_____** (Arbitration Award and Corrected Arbitration Award). The Panel made no finding regarding

TCC's last date of furnishing labor or materials, finding only that substantial completion occurred on March 8, 2016. **R_____** (Arbitration Award and Corrected Arbitration Award).

The HPR filed a motion to vacate the original Award on July 16, 2019 and filed a motion to vacate the Corrected Award on November 18, 2019. **R_____** (HPR's July 16, 2019 & November 18, 2019 Motion to Vacate). In her Order of January 30, 2020 denying the HPR's motions to vacate, Judge Jefferson found, as had the Panel, that the date of substantial completion was March 8, 2016, nine (9) days before March 17, 2016, the date TCC swore before the Court and upon the record in the Register of Deeds Office as the date of last service. **R_____** (Judge Jefferson's January 30, 2020 Order Denying Motion to Vacate).

By Order dated February 16, the Master confirmed the arbitration award against the HPR in the amount of \$2,216,899.06, and he granted leave for the HPR to deposit the resulting judgment amount into court pursuant to Rule 67, SCRPC. **R_____** (Judge Scarborough's February 16, 2021 Order on Various Motions). The HPR has paid the amount of \$2,216,899.06 into court. **R_____** (Atty Ford's April 23, 2021 letter to Charleston County Clerk of Court).

IV. PROCEEDINGS IN THE LOWER COURT RE: MECHANIC'S LIEN CLAIMS

On May 8, 2020, following the lifting of the arbitration stay, Mrs. Beatty moved for partial summary judgment as to TCC'S first cause of action for mechanic's lien foreclosure asserting TCC's service of the lien upon her was untimely. **R_____** (Beatty Motion for Partial Summary Judgment). Mrs. Beatty pointed out that TCC had attested under oath, on the public record, and on four (4) occasions, that March 17, 2016, was the date it ceased providing labor or materials for which it sought to perfect and enforce its lien. **R_____** (Mrs. Beatty's Motion for Summary Judgment).

In response to Mrs. Beatty's Motion, TCC filed its "Objection to Proceeding," Memorandum in Opposition to Pending Summary Judgment Motions and Response to Motion to Deposit Funds

on May 22, 2020. **R_____**(TCC’s Objection to Proceeding). TCC also moved on May 15, 2020 for leave to amend its Verified Amended Complaint. **R_____**(TCC’s May 15, 2020 Motion to Amend). Notably, this proposed Second Amended Complaint removed any reference to the date upon which TCC last performed work or provided materials, instead alleging in Paragraph 12 that TCC “timely gave the Defendants notice of the statement of account for Mechanic’s Lien and timely served and filed its lien relative to the date of last work as determined by the Panel of arbitrators.”. **R_____**(TCC’s May 15, 2020 Motion to Amend Exhibit “1” Proposed Second Amended Verified Complaint). Curiously, the Panel of Arbitrators made *no finding* regarding the date of last work. **R_____**(Arbitration Award, and Corrected Arbitration Award). The only date contained within both the Panel of Arbitrators’ original and corrected awards is March 8, 2016, which the panel determined to be the date of substantial completion. **R_____**(Arbitration Award, and Corrected Arbitration Award).

The Honorable Judge Jennifer McCoy scheduled a hearing on these motions for May 28, 2020. On May 22, 2020, six (6) days prior to the scheduled hearing, TCC filed an affidavit from TCC’s project superintendent, Ryan Tomberlin directly contradicting the four (4) prior sworn statements of TCC’s president. **R_____**(Tomberlin Affidavit). The only explanation in Mr. Tomberlin’s affidavit for Mr. Griffith’s contradictory testimony is found in paragraph 3, stating:

3. TCC believed substantial completion of the project was March 17, 2016.

R_____(Tomberlin Affidavit). TCC, through Mr. Tomberlin’s affidavit, made no effort to explain why Mr. Griffith swore to the facts as he did. Notably, Mr. Griffith, TCC’s president, made no effort to explain or correct his prior sworn statements prior to the May 28, 2020 hearing.

Mrs. Beatty’s motion and others were argued before Judge Jennifer B. McCoy on May 28, 2020. However, she declined to rule on them. Instead, she granted TCC’s motion to amend,

authorized it to file a Second Amended Complaint, and referred this matter to the Honorable Mikell R. Scarborough, Master-in-Equity, directing him to decide the remaining motions, including Beatty's motion for summary judgment. **R_____**(Judge McCoy's August 11, 2020 Order). TCC filed its Second Amended Complaint on August 24, 2020. **R_____**(TCC's Second Amended Complaint). Mrs. Beatty answered on September 3, 2020. **R_____**(Mrs. Beatty's Answer to Plaintiff's Second Amended Complaint). Judge Scarborough scheduled all motions for hearing on November 5, 2020.

On October 1, 2020, more than four (4) years after filing its verified complaints and sworn statements of account and four (4) months after Mrs. Beatty argued her motion for summary judgment before Judge McCoy, TCC filed a motion to amend its statement of account. **R_____**(TCC's Motion to Amend Statement of Account). The unsigned proposed revised statement of account, prepared for the signature of Mr. Griffith, deleted any reference to the date when TCC last performed work on the project and directly contradicts the testimony given by Mr. Griffith in four (4) filings sworn to be true in court and filed of record with the Register of Deeds. **R_____**(TCC's Motion to Amend Statement of Account Exhibit "2"). TCC attached to its motion an affidavit of Mr. Griffith stating, in pertinent part, the following: 1) That he was involved in the Concord and Cumberland project from its beginning, and he signed the verified complaint and statement of account relating to the project; 2) that when he signed the statement of account, he referred to the date of substantial completion; and 3) that additional work was performed through August, 2017. **R_____**(TCC's Motion to Amend Statement of Account Exhibit "3"). TCC filed a subsequent Memorandum in Opposition to Beatty's motion for summary judgment on October 27, 2020. **R_____**(TCC's Memorandum in Opposition). In its Memorandum, TCC did not explain why Mr. Griffith swore under oath that the last date of work was March 17, 2016. **R_____**(TCC's Memorandum in Opposition). Instead, TCC refiled the affidavit of Mr. Tomberlin and a number of Exhibits, including a document identified as

EXHIBIT D which purports to be a payroll summary for Heather Dagg, listing her hours for the months of December, 2016 and January, 2017. **R_____**(TCC’s Memorandum in Opposition Exhibit “A” & Exhibit “D”).

V. THE MASTER’S ORDER

At the November 5, 2020 hearing, the Court issued its oral ruling which, among other things, granted Mrs. Beatty’s summary judgment motion. **R_____**(November 5, 2020 hearing transcript). As requested by the court, Mrs. Beatty submitted a proposed order granting her motion and awarding her attorney’s fees and costs along with an attorney’s fee affidavit and redacted time records in support of her claim for fees. **R_____**(Beatty’s Proposed Order). TCC objected to the proposed order on November 30, 2020, filing with the court a document entitled “TCC Omnibus Response and Objections to Filings and Submittals of Betty Beatty.” **R_____**(TCC’s Omnibus Objections). Beatty responded to TCC’s “Omnibus Response” by letter dated December 3, 2020. **R_____**(Atty Buckley letter to Judge Scarborough addressing TCC’s erroneous and misleading points of law). Argument on TCC’s objections was presented on January 27, 2021. **R_____**(January 27, 2021 hearing transcript). On February 16, 2021, the Master issued an order granting Mrs. Beatty’s motion for summary judgment and awarding her attorney’s fees under § 29–5–10. **R_____** (Judge Scarborough’s February 16, 2021 Summary Judgment Order). On February 19, 2021, the Master entered a Form 4 order confirming the award of attorney’s fees. **R_____** (Judge Scarborough’s February 19, 2021 Form 4).

On March 11, 2021, TCC filed its Notice of Appeal of the Master’s February 16, 2021 Order. **R_____** (TCC’s Notice of Appeal). On March 12, 2021, TCC filed a Motion for Reconsideration pursuant to Rules 59(e), 60(a), or 60(b), SCRCP. **R_____** (TCC’s Motion for Reconsideration and/or Clarification). In its Motion, TCC sought a ruling explaining how the Master exercised his discretion

in awarding attorney's fees to Mrs. Beatty. **R_____** (TCC's Motion for Reconsideration and/or Clarification). On March 19, 2021, Mrs. Beatty filed her Memorandum in Opposition to TCC's motion. **R_____** (Betty L. Beatty's Memorandum in Opposition to TCC of Charleston, Inc.'s Motion for Reconsideration). On March 26, 2021, the Master denied TCC's motion on grounds that TCC's Rule 59(e) motion was untimely as it was submitted well outside of the Rule's ten (10) day window. **R_____** (Judge Scarborough's March 26, 2021 Order). Additionally, the Master further found that TCC had failed to submit any grounds for overturning the judgment and award of attorney's fees under Rule 60. **R_____** (Judge Scarborough's March 26, 2021 Order). The Master further explained his basis for excluding certain fees Mrs. Beatty sought to recover for legal services performed while the case was stayed pending arbitration. **R_____** (Judge Scarborough's March 26, 2021 Order

STANDARD OF REVIEW

A mechanic's lien is an action at law. *Glover v. Lewis*, 299 S.C. 44, 46, 382 S.E.2d 242, 243 (Ct. App. 1989). This Court reviews questions of law de novo. *Ex parte TLC Laser Eye Ctrs. (Piedmont/Atlanta), LLC*, 404 S.C. 385, 392, 745 S.E.2d 105, 109 (2013). Further, [w]hen reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 354–55, 650 S.E.2d 68, 70 (2007) (quoting Rule 56(c), SCRPC).

The award of attorney's fees to the prevailing party in a mechanic's lien action is mandatory. *Utilities Construction Co., Inc. v. Wilson*, 321 S.C. 244, 468 S.E.2d 1 (Ct. App. 1996). The

determination of the amount of attorney's fees that should be awarded under the mechanic's lien statute is addressed to the sound discretion of the trial court. *D.A. Davis Constr. Co. v. Palmetto Props., Inc.*, 281 S.C. 415, 315 S.E.2d 370 (1984). The court's decision regarding such a matter will not be disturbed absent an abuse of discretion. *Id.* An abuse of discretion occurs when, *inter alia*, the trial judge's ruling is based upon an error of law. *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001).

An issue is not preserved where the trial court does not explicitly rule on an argument, and the appellant does not make a *timely* Rule 59(e) motion to alter or amend the judgment. *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 235, 612 S.E.2d 719, 726 (Ct. App. 2005).

Under the two issue rule, where the lower court's decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds, because the unappealed ground becomes the law of the case. *See Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996); *see also First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance"); *Williams v. Jeffcoat*, Op. No. 5834 (S.C. Ct. App. filed July 14, 2021) (Shearouse Adv. Sh. No. 24 at 9).

TCC'S MISSTATEMENTS OF LAW AND FACT

Counsel for Ms. Beatty, like counsel for the HPR, believes that responding to TCC's numerous, erroneous misstatements of both fundamental law and fact in the body of this brief would deprive Mrs. Beatty of effective advocacy, because addressing the volume of misstatements would cloud the clear reasoning for affirming the Master's Order. As such, Mrs. Beatty here separately identifies the following misstatements of law and fact, in addition to those previously identified by the HPR:

I. MISSTATEMENTS OF LAW

In TCC’s “Legal Standard” section, TCC cites *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008) for the proposition “where interpretation of ‘reasonable’ attorneys’ [sic] is at issue, however, the amount of the award is reviewed *de novo*.” (Initial Brief of Appellant at 6). The court *did not* state that the amount of fees awarded is reviewed *de novo*. In fact, under the opinion’s “Standard of Review” section the court correctly noted that “the specific amount of attorneys’ fees awarded pursuant to a statute authorizing reasonable attorneys’ fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion.” *Layman*, 376 S.C. at 444, 658 S.E.2d at 325 (citing *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997)).

In footnote 6 and 7 of TCC’s Initial Brief, it cites *Duncan v. CRS Serrine Eng.*, 337 S.C. 537, 541–42, 524 S.E.2d 115, 117 (Ct. App. 1999) for the proposition that “[i]n South Carolina, an amended pleading supersedes the prior pleading, rendering it a nullity.” (Initial Brief of Appellant at 11). That language—or anything remotely similar to it—appears nowhere in the *Duncan* opinion. TCC has not cited any authority here or before the Master for the proposition that a party’s prior sworn statements are nullified by a subsequent amendment of the verified pleadings containing that sworn testimony. **R_____** (TCC’s Omnibus Response and Objections to Filings and Submittals of Betty Beatty & Atty Buckley’s December 3, 2020 letter to Judge Scarborough).

TCC misrepresents the holding of this Court in *Kitchen Planners, LLC v. Friedman*, 432 S.C. 267, 857 S.E.2d 724 (Ct. App. 2020). TCC devotes an entire section of its brief to misrepresenting what points of law *Kitchen Planners* “supports”, what *Kitchen Planners* “acknowledged”, what *Kitchen Planners* “found”, and what *Kitchen Planners* “undertook to analyze” contending falsely “that the contractor would have the right to amend its pleadings to

correct any error as to the last day of work.” (TCC Initial Brief 12–13). In fact, this Court did not rule that a lien claimant’s right to amend its complaint would have been allowed if raised below. Instead, this Court simply declined to address the issue because the issue was not preserved for appellate review. *Kitchen Planners*, 432 S.C. at 279–80, 851 S.E.2d at 731.

On page 16 of its Initial Brief, TCC cites *Resolution Tr. Corp. v. Eagle Lake & Golf Condos.*, 310 S.C. 473, 476–77, 427 S.E.2d 646, 648 (1993) for the proposition that the public policy underlying the Horizontal Property Act supports TCC’s argument that a lien claimant is not required to serve every individual property owner and can simply serve the HPR. TCC supports this proposition by citing the following portion of the *Eagle Lake* opinion:

[M]ore importantly, the purpose of the *first sentence* is to prevent an individual condominium owner or in this case, the developer, from encumbering the interests of others by giving a lien against the whole property once the master deed is filed.

(TCC Initial Brief at 16) (citing *Eagle Lake*, 310 S.C. at 476–77, 427 S.E.2d at 648) (emphasis added). The text of the “first sentence” the Court was interpreting states: “No lien arising subsequent to recording the master deed or lease as provided in this chapter, and while the property remains subject to this chapter, shall be effective against the property.” S.C. Code Ann. § 27–31–230 (1976). Contrary to the representations of TCC, *Eagle Lake* does not provide any point of law related in any way to a contractor’s obligations to serve every individual unit owner under § 29–5–90. The Court noted “[t]he sole issue before the Court is whether a mortgage, given by a condominium developer on the entire project after the master deed has been filed, is void under the statute.” *Eagle Lake*, 310 S.C. at 473, 427 S.E.2d at 646. There, the Court found the mortgage invalid. *Id.*

From pages 17 through 19 of its initial brief TCC argues that the Master’s “Grant of Summary Judgment Without Discovery Is Inappropriate, Especially Where Specifically Ordered by the Circuit Court.” (TCC Initial Brief at 17). TCC states that Judge McCoy’s Order granting

TCC's Motion to amend its Verified Complaint bound the Master to allow [TCC's] discovery. (TCC's Initial Brief at 18). Unsurprisingly, it did not. TCC served its discovery *six* (6) days before Judge McCoy's May 28, 2020 hearing on Mrs. Beatty's Motion for Summary Judgment. **R___**(TCC's Discovery Requests to Defendants attached as Exhibit "E" to TCC's May 22, 2020 Objection to Proceeding). At the hearing the extent of TCC's argument regarding discovery was "we're about to start discovery on this portion of the case that has been stayed." **R___**(May 28, 2020 Hearing Transcript at 28:4-5). Judge McCoy never ruled TCC was entitled to discovery. At the November 5, 2020 Hearing before the Master, TCC never raised the issue of whether it was entitled to discovery from Mrs. Beatty. *See generally*, **R___**(November 5, 2020 Hearing Transcript). TCC never raised the issue in its "Omnibus Objections" to Mrs. Beatty's proposed order or in the January 27, 2021 hearing on those objections. **R___**(TCC's Omnibus Objections to the Filings and Submittals of Betty Beatty). The Master never ruled on TCC's entitlement to discovery. At the January 27, 2021 hearing, he found that based upon TCC's own records and affidavits of service that TCC did not comply with the mechanic's lien statutes requirements for perfecting a lien by failing to timely serve the unit owners. **R___**(January 27, 2021 Hearing Transcript at 16:11-18:7). The Master's February 16, 2021 Order granting Mrs. Beatty's Motion for Summary Judgment does not contain a ruling on whether TCC was entitled to discovery, and TCC did not raise the issue in its untimely Rule 59(e), SCRC Motion. **R___**(Judge Scarborough's February 16, 2021 Summary Judgment Order). Nevertheless, the issue is irrelevant as to Mrs. Beatty as she was served with TCC's filings and its attorney's June 21, 2016 letter on the first day TCC began serving unit owners, June 22, 2016, six (6) days after the lien dissolved by operation of law. **R___**(June 22, 2016 Affidavit of John R. Gamble).

On page 18 of its Initial Brief, TCC states “[t]he mechanic’s lien statute does not specify how a lien must be served but allows courts to authorize any measure of providing notice that “under the circumstances of the case [are] considered most proper and effectual.” (TCC’s Initial Brief at 18) (citing S.C. Code Ann. § 29–5–200 (1976)) (alteration in original).¹ There are several misrepresentations in this single sentence. First, it is axiomatic that there is a legal distinction between “service” and “notice” and that notice is not service.² The mechanic’s lien statute requires the lienholder to “*serve[]* upon the owner” a statement of account. S.C. Code Ann. § 29–5–90 (emphasis added). TCC served Mrs. Beatty by process server on March 22, 2021. The letter addressed to her by TCC’s counsel is dated June 21, 2016. **R___** (June 21, 2016 Letter from Atty Epting to Mrs. Beatty). In order for § 29–5–200 to apply, Mrs. Beatty would need to be absent *and* the court must order service by publication or by some other manner. Here, TCC personally served Mrs. Beatty the day after the letter was drafted to her attention. Second, the statutory scheme within Title 29 which TCC cites for this broad proposition pertains to notice of the lien holder’s *petition* to enforce the lien, not the lien itself. S.C. Code Ann. §§ 29–5–140 (1976), *et seq.*

II. TCC’S MISSTATEMENTS OF FACT

TCC’s brief is replete with misstatements as to what is “uncontested,” what is “*res judicata*,” and what the basic facts of this case are. (TCC Initial Brief at 1, 4, and 8). These misstatements are largely addressed by the HPR and by Mrs. Beatty *infra*. However, it is necessary

¹ This is indeed a creative misstatement of law, as a cursory WestLaw search reveals that TCC’s cite of § 29–5–200 is the first and only citation of the statute in any context whatsoever.

² Service is defined as “The formal delivery of a writ, summons, or other legal process, pleading, or notice to a litigant or other party interested in litigation; the legal communication of a judicial process.” *Service*, *Black’s Law Dictionary* (11th ed. 2019). Notice, on the other hand, is “Legal notification required by law or agreement, or imparted by operation of law as a result of some fact (such as the recording of an instrument).” *Notice*, *Black’s Law Dictionary* (11th ed. 2019). Service of process is governed by Rule 4, SCRCF.

to separately address TCC's most egregious misstatements, which pertain to its blatant mischaracterizations of the rulings below made by both Judge McCoy and the Master. Throughout its brief, TCC's discusses, analyzes, and seeks to apply rulings that were either extremely narrow, based on different grounds than TCC implies, or do not exist at all. Just as it did below, TCC continues to argue before this Court new issues whenever it becomes trapped by its previous positions or contentions.³ Accordingly, it is essential that this Court have a clear picture of what was—and what was not—ruled on below and the basis of those rulings.

Throughout its brief, TCC mischaracterizes Judge McCoy's August 11, 2020 Order granting TCC's Motion to Amend its Amended Verified Complaint. (TCC's Initial Brief at 9, 10, 11, 14, 15, and 18). TCC seeks to import *res judicata* status to that order where no such status exists, arguing that the Master impermissibly overruled Judge McCoy. (TCC's Initial Brief at 15). TCC asserts at various points: (1) that "Judge McCoy *rejected* the HPR's argument" that TCC was bound by the March 17, 2016 date; (2) "Judge McCoy *considered* the evidence regarding the date of last work, and over Defendants' objections, granted TCC's motion to amend."; (3) "In granting the amendment, Judge McCoy *rejected* the HPR's argument that TCC was bound by an erroneous statement of the date of last work."; (4) "Nevertheless, the Master denied TCC's motion to amend its statement of account, though the amendment was sought for the very same purpose, and *overruled* Judge McCoy, finding TCC was bound by the erroneous date of last work.", and (5) "[Judge McCoy's] order *bound* the Master to allow the discovery." (TCC's Initial Brief at 9, 10, 11, 14, 15, and 18) (emphasis added).

³ Mrs. Beatty described TCC's ever changing tactics to the Master as follows: "Now we have a separate set of arguments being made . . . I've seen what's happened before. Every time I do that you get another movement. Well, we need to add this. We need to add that. I'm trying to hit a *moving target*. Targets can't move legally[.]" R___ (November 5, 2020 Hearing Transcript at 37:11–18) (emphasis added).

Let's be clear. The *seven* (7) sentence order drafted by TCC and entered by Judge McCoy only granted TCC's motion to amend on the basis that "Rule 15(b) provides that leave to amend a pleading should be freely given[.]" **R_____** (Judge McCoy August 11, 2020 Order at 2). The Order contains no conclusions of law or findings of fact and expressly states "the Court finds it would be inappropriate to *consider* the remaining motions at this time." (Judge McCoy August 11, 2020 Order at 2). Despite TCC's bald assertions, Judge McCoy did not reject or consider the merits of any argument outside of whether TCC should be allowed to amend its complaint under Rule 15. The Master, in making his conclusions, did not overrule Judge McCoy in any manner.

Similarly, TCC falsely contends that the Master "invalidated" TCC's lien. (TCC Initial Brief at 1.) He did not. Instead, he ruled that the lien had dissolved by operation of law on June 16, 2016, four (4) years, eight (8) months earlier. **R_____** (Judge Scarborough's February 16, 2021 Summary Judgment Order at 17). On the first page of its brief, TCC states "The trial court invalidated Appellant TCC of Charleston, Inc.'s ("TCC's") lien because TCC used the date of substantial completion rather than the date of last work in the statement of account accompanying the lien." (TCC Initial Brief at 1.) TCC devotes an entire section of its brief entitled "Courts Cannot Invalidate a Lien Because of an Error in the Statement of Account" to the argument that the Master erred because "[t]he mechanic's lien law expressly states that an inaccuracy in the statement of account cannot form the basis for invalidating a lien." (TCC Initial Brief at 11). Unsurprisingly, this is not what the Master ruled. The Master did not "invalidate TCC's [] lien because TCC used the date of substantial completion rather than the date of last work." **R_____** (Judge Scarborough's February 16, 2021 Summary Judgment Order at 17). The Master found that "TCC failed to perfect its lien and [] its lien *dissolved* by operation of law" because "TCC sought to perfect and sue upon a lien for work performed on or before March 17, 2016" and failed to serve Mrs. Beatty within

ninety (90) days. (Judge Scarborough’s February 16, 2021 Summary Judgment Order at 17). Further, the Master did not invalidate the lien because of an error in the statement of account. (TCC’s Initial Brief at 11). Instead, the Master found that “TCC cannot change the date asserted in its statement of account,” and “The Court cannot disregard TCC’s four sworn statements that March 17, 2016 was the date of last furnishing work or materials.” (Judge Scarborough’s February 16, 2021 Summary Judgment Order at 11–12). The Master ultimately held:

[A] lien claimant who choose to include a date of last service in his verified complaint of account filed with the Register of Deeds is bound by the date the claimant chose to insert and cannot retroactively perfect a dissolved lien by amending its statement of account to delete that date. There is no dispute of material fact that TCC failed to perfect its lien and that its lien dissolved by operation of law.

Judge Scarborough’s February 16, 2021 Summary Judgment Order at 17).

ARGUMENT

I. THE APPELLANT HAS NOT APPEALED THE MASTER’S FINDING AND CONCLUSION THAT IT SOUGHT TO PERFECT AND ENFORCE A LIEN FOR WORK PERFORMED NO LATER THAN MARCH 17, 2016. AS SUCH, IT IS NOW THE LAW OF THE CASE AND MANDATES AFFIRMANCE OF THE MASTER’S ORDER

TCC has not appealed the Master’s finding and conclusion that the lien TCC sought to enforce was for work performed no later than March 17, 2016.

In its brief, TCC asserts numerous times that “the date of last work is uncontested.” (TCC’s Initial Brief at 8). It is beyond question that TCC sought to enforce a lien for work it performed no later than a date certain. That date is March 17, 2016.⁴ TCC attested to this fact four (4) times

⁴ Interesting enough, the only other judicially determined date concerning the performance of work is March 8, 2016, nine (9) days *before* TCC’s attested last date of furnishing, March 17, 2016. The March 8th determination was made by the Panel in its two (2) arbitration awards and included by TCC in its proposed order to Judge Jefferson, which she subsequently signed and issued. R___ (Arbitration Panel’s Award, Corrected Award, and Judge Jefferson’s Order Denying Motion to Vacate).

in its verified complaints and statements of account and it swore that the work had been completed, that payment was demanded, and that payment was due for the balance of its contract. The Master agreed, and in his February 16, 2021 Order granting Mrs. Beatty's Motion of Summary Judgment, the Master concluded no less than five (5) times that "[t]he lien TCC filed and sued upon sought payment for work performed on or before March 17, 2016." R____ (Judge Scarborough's February 16, 2021 Summary Judgment Order at 4, 5 11, 12, and 17). TCC has not appealed this ruling which forms an independent basis for granting summary judgment to Mrs. Beatty. As such, this unappealed ruling is now the law of the case. *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 432, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance.").

As the law of the case, the grant of summary judgment must be affirmed, because TCC failed to serve Mrs. Beatty with its lien until June 22, 2016. The lien dissolved as a matter of law on June 16, 2016.

II. THE MASTER CORRECTLY RULED THAT TCC'S LIEN DISSOLVED BY OPERATION OF LAW

The Master correctly ruled that TCC was bound by its prior sworn statements concluding that both the evidentiary and testimonial nature of verified pleadings and the public policy of maintaining a reliable public real property record prevented TCC from retroactively altering the March 17, 2016 date after its lien had dissolved.

- (A) The Master correctly ruled that TCC was bound by its sworn verified complaints attesting that March 17, 2016 was the last date it furnished labor or materials regardless of whether TCC filed a Second Amended Complaint.**

TCC has filed in circuit court and in the Register of Deeds a total of four (4) sworn statements attesting that the last date materials or labor were furnished was March 17, 2016.

R_____ (TCC’s Amended Summons and Verified Complaint, Amended Notice and Certificate of Mechanic’s Lien and Amended Statement of Account).

TCC was not required to verify its complaints, nor was it required to include a date of last service within its complaints or sworn statements of account. *Compare* S.C. Code Ann. §§ 29–5–90 & 29–5–120 (1976) (discussing the minimum contents required for a statement of account and requirements for initiating a mechanic’s lien foreclosure action) *with* Rule 9(i), SCRCP (“In an action on an account the pleader shall attach a verified copy of the account to the pleading, or if the items of the account are set forth in the pleading, it must be verified.”). TCC swore to the March 17, 2016 date on the public record not once, not twice, but four (4) times. Sworn statements carry with them consequences to the party making those statements. *See generally Quinn v. Sharon Corp.*, 343 S.C. 411, 415, 540 S.E.2d 474, 476 (Ct. App. 2000) (Anderson, J., concurring) (“Under the doctrine of judicial estoppel, a party that has assumed a particular position in a judicial proceeding, via its pleadings, statements, or contentions made under oath, is prohibited from adopting an inconsistent posture in subsequent proceedings.”) (citing *Black’s Law Dictionary* (6th ed. 1990)). South Carolina, like other jurisdictions, recognizes that verified complaints, unlike regular unverified pleadings, are the equivalent of affidavits for purposes of summary judgment. *Dawkins v. Fields*, 354 S.C. 58, 67, 580 S.E.2d 433, 438 (2003); *see also Al-Mujahidin v. Franklin*, No. CV 9:15-1978-BHH-BM, 2016 WL 3462520, at *1 (D.S.C. May 31, 2016), *report and recommendation adopted*, No. CV 9:15-1978-BHH, 2016 WL 3440602 (D.S.C. June 23, 2016) (“Plaintiff cannot save his claim from summary judgment by submitting a sworn statement that contradicts his *previous sworn statements in his verified Complaint*, but also his own exhibits attached to his affidavit.”) (emphasis added); *Bickerstaff v. Vassar College*, 196 F.3d 435, 455 (2d Cir. 1999) (“It is beyond cavil that a party may not create an issue of fact by submitting an affidavit in opposition to a summary judgment motion

that...contradicts the affiant's previous . . . testimony.”) (internal quotations and citations omitted); *Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991) (party cannot create issue of fact by contradicting prior sworn testimony).

TCC ignores the entirety of the legal significance of its sworn testimony.⁵ Verifying a complaint is much more than pleading “on information and belief.” *See Dawkins*, 354 S.C. at 58, 580 S.E.2d at 433; *Hecht v. Freisleben*, 28 S.C. 181, 5 S.E. 475, 477 (1888). The simple act of filing a second amended complaint deleting the March 17th date did not render its prior sworn statements within its verified pleadings a “nullity” as contended by TCC. **R___** (TCC’S Initial Brief at 11). As noted *infra*, TCC cites *Duncan* to support the proposition that “[i]n South Carolina, an amended pleading supersedes the prior pleading, rendering it a nullity” (TCC’S Initial Brief at 11). Neither *Duncan*—nor any other South Carolina authority—holds that prior verified pleadings are rendered a “nullity” after they are amended. 337 S.C. at 541–42, 524 S.E.2d at 117. TCC cites no authority which indicates that prior sworn statements or a verified pleading are nullified by a subsequent amendment removing portions of the complaint containing sworn testimony which defeats a portion of TCC’s case.

The courts of South Carolina—along with *every* federal court of appeals⁶—recognize the significance of a verified pleading wherein the party has testified under penalty of perjury that

⁵ In fact, TCC only uses *a single* sentence in the body of its Initial Brief to inform this Court that it filed two (2) *verified* complaints, and its Initial Brief does not use the terms “swore,” “attest,” or “affirm.” (TCC Initial Brief at 4).

⁶ In order by circuit: *Sheinkopf v. Stone*, 927 F.2d 1259, 1262 (1st Cir. 1991) (“We think the better rule is that a verified complaint ought to be treated as the functional equivalent of an affidavit to the extent that it satisfies the standards explicated in Rule 56(e).”); *Fitzgerald v. Henderson*, 251 F.3d 345, 361 (2d Cir. 2001) (“This verification was the equivalent of the oath that would be given with respect to an affidavit.”); *Revoek v. Cowpet Bay W. Condo. Ass’n*, 853 F.3d 96, 100 n.1 (3d Cir. 2017) (“We consider as affidavits Walters and Kromenhoek’s sworn verified complaints, to the extent that they are based upon personal knowledge and set out facts that would be admissible in evidence.”); *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991) (“However,

“[B]ased upon my own personal knowledge the facts therein are true and correct.” *See generally Dawkins*, 354 S.C. at 58, 580 at S.E.2d 433. TCC testified under oath in Paragraph 12 of its First Verified Complaint and Paragraph 14 of its Amended Verified Complaint “[t]hat Plaintiff *has completed its work* and has demanded payment for the balance due on its contract from the Defendants.” **R_____** (TCC’ Verified Complaint & Verified Amended Complaint) (emphasis added).

TCC, misrepresents the effect of Judge McCoy’s August 11, 2020 Order. As noted *infra*, TCC asserts that its two (2) prior verified complaints became a “nullity,” because they were superseded by its Second Amended Complaint. (TCC’s Initial Brief at 11). No authority supports this contention. TCC further asserts that, because Judge McCoy’s Order “is *res judicata* that TCC is not bound by the date of last work as listed in its initial pleadings.” *Id.*⁷ TCC cites nothing to support this contention, likely because the opposite is true. The existing precedent cited above

a *verified* complaint is the equivalent of an opposing affidavit for summary judgment purposes, when the allegations contained therein are based on personal knowledge.”) (emphasis in original); *Barker v. Norman*, 651 F.2d 1107, 1114 (5th Cir. 1981) (“To the extent that a verified pleading meets that requirement then it may properly be considered as equivalent to a supporting or opposing affidavit, as the case may be.”); *Thaddeus-X v. Blatter*, 175 F.3d 378, 385 (6th Cir. 1999) (en banc) (“a verified complaint or additional affidavit, as presented in this case, satisfies the burden of the nonmovant to respond”); *Beal v. Beller*, 847 F.3d 897, 901 (7th Cir. 2017) (“The verified complaint does not lose its character as the equivalent of an affidavit just because a later, amended complaint, is filed.”); *Roberson v. Hayti Police Dept.*, 241 F.3d 992 (8th Cir. 2001) (“A plaintiff’s verified complaint is the equivalent of an affidavit for purposes of summary judgment....”); *McElyea v. Babbitt*, 833 F.2d 196, 198 (9th Cir. 1987)(“a verified complaint may be treated as an affidavit to the extent that the complaint is based on personal knowledge and sets forth facts admissible in evidence.”) (citations omitted); *Conaway v. Smith*, 853 F.2d 789, 792 (10th Cir. 1988) (“a verified complaint may be treated as an affidavit for purposes of summary judgment if it satisfies the standards for affidavits set out” in Rule 56); *Jacoby v. Baldwin Cty.*, 666 F. App’x 759, 760 (11th Cir. 2016) (“The following facts are taken from Jacoby’s verified complaint—which may be treated as an affidavit at summary judgment[.]”); *Neal v. Kelly*, 963 F.2d 453, 457 (D.C. Cir. 1992) (“We think the better rule is that a verified complaint ought to be treated as the functional equivalent of an affidavit to the extent that it satisfies the standards explicated in Rule 56(e).”).

⁷ Instead, TCC asserts that the date of last furnishing was January 23, 2017 or *ten* (10) months after TCC filed its lien. (TCC’s Initial Brief at 8). *See Preferred Savings*, at 273, 368 S.E.2d at 81 (holding that the date of cessation of labor must pre-date the notice of lien).

regarding testimony in verified pleadings entirely defeats TCC's argument. Judge McCoy's order authorizes TCC to file a Second Amended Complaint, nothing more.

TCC asserts that a party is bound by its pleadings "unless withdrawn, altered, or stricken by amendment or otherwise." (TCC's Initial Brief at 13). However, the two authorities cited for this proposition, *Kitchen Planners*, and *Postal v. Mann*, deal with *unverified* complaints. See *Kitchen Planners*, 432 S.C. at 278, 851 S.E.2d at 730–31; *Postal v. Mann*, 308 S.C. 385, 418 S.E.2d 322 (Ct. App. 1992). TCC states that it is "uncontested" that January 23, 2017 was the date of last work. (TCC's Initial Brief at 4).

Here, the key allegation is the date of last work. TCC cannot simply revoke its sworn, verified statements through the filing of an amended complaint four (4) years after placing a lien upon Mrs. Beatty's property expressly attesting that the work was completed and that the last date of that work was March 17, 2016. The Master correctly ruled that TCC was bound by its sworn testimony that the work subject to its lien had been completed on or before March 17, 2016. Regardless of TCC's Second Amended Complaint, its two (2) prior verified complaints were properly before the Master as sworn affidavits both of which unequivocally attest to the fact that the last day TCC performed work or furnished materials was March 17, 2016.

(B) The Master correctly ruled that TCC was bound by its sworn statements of account filed with the Register of Deeds attesting that March 17, 2016 was the last day work or materials were provided and that, in order to protect the reliability of the public real property record, dates of last furnishing within statements of account cannot be amended after the lien has dissolved by operation of law.

The Master correctly ruled that TCC was bound by the sworn statement of account TCC filed in the Register of Deeds, which attested that March 17, 2016 was the last day labor or materials were provided. Before the Master, TCC asserted that a statement of account can be amended just as a complaint pursuant to S.C. Code Ann. § 29–5–100 (1976) and Rule 15, SCRPC.

TCC has abandoned these argument on appeal, and now asserts that under § 29–5–100, “an inaccuracy in the statement of account cannot form the basis for invalidating a lien.” (TCC’s Initial Brief at 11). Nonetheless, the Master correctly ruled that § 29–5–100 does not, by its own terms, authorize a revision to the date of last work filed in a defendant’s chain of title filed at the Register of Deeds. The Master must be affirmed in order to effectuate the clear public policy of maintaining integrity and reliability in the public record as embodied in this Court’s decision in *Preferred Savings*, at 273, 368 S.E.2d at 81.

i. The Master correctly found Section 29-5-100 does not authorize amendment of the date of last work included within a lien claimant’s sworn statement of account.

Contrary to TCC’s assertion, § 29–5–100 does not authorize TCC to amend the March 17, 2016 date of last work asserted in its two (2) sworn statements of account. TCC bases its assertion on § 29–5–100’s title “Proceedings not invalidated by inaccuracy of statement of account.” The Master did not “invalidate” TCC’s lien by refusing in 2021 to allow the sworn date of last labor and materials to be removed from a proposed third sworn statement of account. The lien dissolved on June 16, 2016 and did not exist at the time TCC sought to amend its statement of account more than four (4) years later. A statute’s title is not the law, and a court must look to the text of the statute itself. *T.W. Morton Builders, Inc. v. von Buedingen*, 316 S.C. 388, 402, 450 S.E.2d 87, 95 (Ct. App. 1994) (stating that a court may look to the title of the statute to determine legislative intent, but that “the basic rule of statutory construction is that words in a statute must be given their plain and ordinary meaning.”) S.C. Code Ann. § 2–13–175 (1976) specifically states that headings or captions within the S.C. Code are not part of any code section and are not the law. It reads, in its entirety, as follows:

The catch line heading or caption which immediately follows the section number of any section of the Code of Laws must not be deemed to be a part of the section

and must not be used to construe the section more broadly or narrowly than the text of the section would indicate. The catch line or caption is not part of the law and is merely inserted for purposes of convenience to the person using the Code.

See also R___ (Atty Buckley December 3, 2020 Letter to Judge Scarborough). An examination of the text of the statute shows that it does not mention *all* inaccuracies within a statement of account, but, rather, only contemplates two (2) excusable inaccuracies: those “*relating* to the property to be covered by the lien, if the property can be reasonably recognized, or in stating the amount due for the labor or materials[.]” S.C. Code Ann. § 29–5–100 (emphasis added).⁸ The statute is thus unambiguously clear as to *which* inaccuracies in a statement of account are excusable. Using the statute’s title to excuse all conceivable inaccuracies, as TCC suggests, would be inappropriate because “[f]or interpretive purposes, the title of a statute and heading of a section are of use *only* when they shed light on some ambiguous word or phrase and as tools available for resolution of doubt, but *they cannot undo* or limit what the text makes plain.” *Garner v. Houck*, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993). Here, there is no ambiguity that the date of last furnishing is not one of the two (2) excusable inaccuracies “relating to the property” listed in § 29–5–100, and TCC cannot use the statutory title to expand what the text makes plain.

Where, as here, a lien claimant included in his sworn statement of account the date he last performed work or provided materials and filed that sworn statement as a cloud upon an owner’s title, § 29–5–100 provides no basis for revising that date *four (4) years* after the lien dissolved (or at any time after the lien dissolved for that matter). Rather, the statute is silent as to an inaccuracy as to the dates of work. The rules of statutory interpretation are clear: the General Assembly is

⁸ TCC complains of Mrs. Beatty’s description of the two (2) excusable inaccuracies under § 29–5–100 as “non-fatal” inaccuracies. (TCC’s Initial Brief at 12). The fact that the statute explicitly states that the two (2) excusable inaccuracies do not “*invalidate* the proceedings” explicitly implies that inexcusable inaccuracies, like an incorrect date of last furnishing, do invalidate the proceedings and are thus, fatal.

presumed to intend for the words of a statute to mean what they say. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (S.C. 2000). Likewise, where the General Assembly chose not to include words within a statute, this Court cannot add language to the plain language of the statute. *Id.* By omitting timing errors among those inaccuracies, which are not fatal, the Court must presume the legislature meant to do so. Accordingly, § 29–5–100 provides no basis for TCC to alter or delete its date of last work at the project. On its face, the lien TCC filed, recorded in the public record, and sued upon, seeks payment for work performed no later than March 17, 2016.

By filing its statement of account of record, TCC represented to the parties—and to anyone reviewing the public record—that it was asserting a lien for materials and labor for which it was then owed exactly \$2,385,503.57 and that the last day it provided labor or materials at the property was March 17, 2016. Section 29–5–100 does not expressly or implicitly authorize TCC to retroactively alter that date it included in the lien it filed of record.

ii. *Kitchen Planners, LLC v. Friedman does not support TCC’s argument that a statement of account can be amended.*

TCC misrepresents the holding of this Court’s opinion in *Kitchen Planners, LLC v. Friedman*, 432 S.C. at 267, 857 S.E.2d at 724. In *Kitchen Planners*, this Court affirmed the grant of summary judgment based upon the date of last work the plaintiff, Kitchen Planners, alleged in *both* its complaint and asserted in its lien. *See id.* TCC falsely contends that the Court of Appeals “acknowledged that the contractor would have the right to amend its pleading to correct any error as to the last day of work.” (TCC’s Initial Brief at 13). This Court acknowledged no such right. Rather, the Court refused to address it, because the issue was not argued below, explicitly stating “[a]lthough Kitchen Planners argues it was entitled to amend its complaint to change the date it last provided materials, it never requested leave of the circuit court to amend its pleadings; rather it raises this argument for the first time on appeal. Thus, we find this argument is unpreserved.”

Kitchen Planners, 432 S.C. at 279–80, 851 S.E.2d at 731. TCC cites no South Carolina or other precedent authorizing a lien claimant who files a lien, which, on its face, seeks payment for work performed on or before a date certain sworn to be true to alter that date after the lien has dissolved by operation of law. Public policy considerations assuring the reliability of the public record require that TCC be held to the March 17, 2016 date.

iii. *The Master correctly found that, when a lien claimant swears to the date of last work within its statement of account, the date cannot later be amended because the public record must be reliable for title examiners who find a lien of record.*

The Master found that “on its face the lien TCC filed, recorded in the public record, and sued upon, seeks payment for work performed no later than March 17, 2016.” R___ (Judge Scarborough’s February 16, 2021 Summary Judgment Order at 12). The Master recognized that the filing of a mechanic’s lien places a cloud upon the title to real property by providing a record notice of the claim, citing this Court’s opinion in *Preferred Savings* and TCC has not contested this ruling on appeal. In *Preferred Savings*, this Court recognized that matters of public record must be reliable for persons seeking to determine the status of title to the property. 295 S.C at 273, 368 S.E.2d at 81. A record examiner should be able to review a filed notice of mechanic’s lien and determine with certainty whether the lien remains valid and subsisting at the time of the examination. *Id.* In reaching its holding, the *Preferred Savings* Court cited with approval the North Carolina case of *Strickland v. General Building and Masonry Contractors, Inc.*, 22 N.C. App. 729, 207 S.E.2d 399 (N.C. Ct. App. 1974).

Our mechanic’s lien statute does not require that the statement of account include a date when labor and materials were last provided. S.C. Code Ann. § 29–5–90. However, in order to effectuate the policy considerations discussed in *Preferred Savings*, a claimant—like TCC—who includes a date of last performing work in their statement of account must be held to it. In

Strickland, the North Carolina Court of Appeals addressed this very issue. There, the claimant filed his notice and claim of lien on July 27, 1973 with a statement declaring that materials were last furnished upon the property on March 28, 1973. *Id.* This was beyond North Carolina’s requirement that the claim of lien be filed no later than 120 days after the furnishing of last labor. N.C. Gen. Stat. § 44A–12 (2019). At the time North Carolina, like South Carolina now, did not require that a claimant state in his claim of lien the date of last furnishing labor or materials. *Compare* S.C. Code Ann. § 29–5–90 (1976) *with Strickland*, 22 N.C. App. at 731, 207 S.E.2d at 400 (stating that under the then version of § 44A–12 “there is no requirement that a mechanic, laborer, or materialman state in his claim of lien the date of last furnishing.”).

The North Carolina Court of Appeals in *Strickland* held that, even though the date of last furnishing is not required by statute, it cannot be treated as “a mere surplusage,” because to do so “would do injury to the purpose of the lien statute.” *Strickland*, 22 N.C. App. at 731, 207 S.E.2d at 400. It would require title examiners to go outside the public record to discover the true date of last furnishing which, in turn, would “impose an undue burden on the title examiner and would damage the principle of reliance upon the public record.” *Id.* at 731, 207 S.E.2d at 400–01.

This Court recently affirmed the above stated law in the *Kitchen Planners* case, *supra*. In *Kitchen Planners*, a contractor filed a complaint and a lien stating that it provided labor and materials “beginning in or around March 16, 2015 and continuing through August 18, 2015. The contractor served the owner with the lien on November 17, 2015—91 days later—and the owner then filed a motion to dismiss the mechanic’s lien as untimely. *Kitchen Planners*, 432 S.C at 275, 851 S.E.2d at 724. The Circuit Court dismissed the foreclosure action, and the contractor appealed. *Id.* The contractor argued, like TCC here, that there was a discrepancy between the date alleged in the lien and the date of last work and posited that it could cure the timeliness issue by amending its pleadings

to assert a later date when it actually finished work on the project. *Id.* at 279, 851 S.E.2d at 732. The Court of Appeals affirmed the Circuit Court. *Id.* In doing so, the Court of Appeals found that the contractor was bound by the dates asserted in its pleadings and on the face of the lien. *Id.* Thus, Kitchen Planners' lien dissolved, because it failed to serve the lien within ninety (90) days of the last date it supplied labor or materials on the project. *Id.* at 281, 851 S.E.2d at 732.

The record is clear that TCC did not serve Betty Beatty until June 22, 2016. **R_____** (June 22, 2016 Affidavit of John R. Gamble). Anyone examining her title would see that TCC swore to March 17, 2016, as the last date of furnishing materials or labor. TCC did not file the affidavit of service evidencing service of the lien upon Mrs. Beatty until November 3, 2020, more than four (4) years after serving her. **R_____** (June 22, 2016 Affidavit of John R. Gamble). Anyone examining title to the property between June 10, 2016 and November 3, 2020 would conclude that Beatty had not been served and that the lien was dissolved. Even after the affidavit of service was filed, the examiner would conclude that the service of process occurred more than ninety (90) days after the date set forth in the sworn statements of account and the verified complaints and that the lien was expired. Therefore, the public record advises anyone examining it that the lien had expired. The Master, in order to effectuate the policy reasons articulated by this Court in *Preferred Savings* and *Kitchen Planners*, correctly found that TCC could not amend its statement of account and must be held to the March 17, 2016 date asserted in its sworn statement of account.

(C) The Master correctly ruled that TCC's Lien was not timely served on Mrs. Beatty.

In light of the fact that TCC did not appeal the Master's ruling that the lien TCC sued upon represented work no later than March 17, 2016 and the fact that Mrs. Beatty was served ninety-seven (97) days later, the Master correctly ruled that the lien upon her property was expired. TCC sought to perfect and sue upon a lien for work performed on or before March 17, 2016, and TCC

was required to serve the lien within ninety (90) days of that date. S.C. Code Ann. § 29–5–90. Service of the HPR, even assuming it had been properly effectuated,⁹ does not constitute service upon Mrs. Beatty. Mrs. Beatty was served June 22, 2016, after TCC’s lien dissolved by operation of law on June 16, 2016. The clear language of § 29–5–90 states that the lien dissolves unless it is perfected. In order to perfect and enforce the lien against the property, the person claiming it must: (1) serve and record a certificate of lien within ninety days after he ceases to furnish labor or materials, § 29–5–90; (2) bring suit to foreclose the lien within six months after he ceases to furnish labor or materials, § 29–5–120; and (3) file notice of pendency of the action within six months after he ceases to furnish labor or materials, § 29–5–120. “If these steps are taken, the person claiming the lien may foreclose against the property to satisfy the debt. On the other hand, if he fails to take any one of these steps, the lien against the property is dissolved.” *Shelley Const. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 27, 336 S.E.2d 488, 490 (Ct. App. 1985) (citing S.C. Code Ann. §§ 29–5–90 & 29–5–120). Strict compliance with the statute is required as “[t]his clear statutory mandate leaves no room for interpretation of its application [.]” *Multiplex Bldg. Corp. v. Lyles*, 268 S.C. 577, 580, 235 S.E.2d 133, 135 (1977); *Butler Contracting, Inc. v. Ct. St., LLC*, 369 S.C. 121, 130, 631 S.E.2d 252, 257 (2006) (“[T]he requirements of the statute must be strictly followed.”). The Master correctly ruled that Mrs. Beatty was not timely served.

The Master followed and applied the strict requirements of the statute and ruled as he was required to do so. Once a lien has dissolved, there is no provision in the law to revive it.

⁹ There is no evidence in the record to establish when—or even whether—the HPR was served.

III. THE MASTER CORRECTLY RULED THAT MRS. BEATTY WAS ENTITLED TO FEES AS THE PREVAILING PARTY UNDER THE MECHANIC'S LIEN STATUTE

This Court should affirm the Master's order awarding Mrs. Beatty attorney's fees under the Mechanic's Lien statute. The Master granted summary judgment to Mrs. Beatty upon TCC's mechanic's lien claim. Because Mrs. Beatty defeated TCC's mechanic's lien claim, the Master correctly found that she was the prevailing party under the mechanic's lien statute. While the amount of fees to be awarded is discretionary, the question of her entitlement to fees is not. *Utilities Construction Co.*, 321 S.C. at 249, 468 S.E.2d at 3. In fact, TCC does not contest that Mrs. Beatty was not entitled to an award of fees.

The Court must affirm the Master's award for two (2) reasons. First, TCC failed to preserve the issue of attorney's fees for appeal. Second, TCC cannot establish that the Master abused his discretion in awarding Mrs. Beatty fees and costs in the total amount of \$76,000.00.

(A) TCC failed to preserve any issue for appeal regarding the Master's award of attorney's fees to Mrs. Beatty.

TCC failed to preserve any issues related to the Master's award of attorney's fees, because it failed to object to the Master's February 16, 2021, Order granting those fees. TCC declined to raise the issue by explicitly foregoing a hearing on the fee award following the Master's February 16, 2021 order. In its untimely Rule 59(e) motion, TCC attempted to object to the award of attorney's fees. Because TCC's motion to reconsider was untimely, the Master dismissed it without ruling on the issue TCC sought to argue therein. Thus, there is no decision preserved for this Court to review.

By way of procedural review, the Master issued an oral ruling granting summary judgment to Mrs. Beatty on November 5, 2020 and requested a proposed order along with affidavits of attorney's fees and supporting documentation. R____(November 5, 2020 hearing transcript). On

November 18, 2020, counsel for Mrs. Beatty submitted an initial proposed order granting summary judgment to Mrs. Beatty along with an affidavit of attorney's fees and supporting documents. Thereafter, TCC filed its "Omnibus Objections" to Mrs. Beatty's proposed order. **R_____** (TCC's Omnibus Objections). In its objections, TCC noted that the Master had not heard argument on Mrs. Beatty's fees and challenged the contents of Mrs. Beatty's fee submissions. **R_____** (TCC's Omnibus Objections). On January 27, 2021, the Master heard argument on TCC's objections to both the HPR and Mrs. Beatty's proposed orders. At that hearing, TCC failed to address any of its objections to the fee affidavit submitted by Mrs. Beatty's counsel and never even raised the issue of Mrs. Beatty's fees. **R_____** (January 27, 2021 hearing transcript). As such there was never a *ruling* on TCC's objections. At the conclusion of the hearing, the Master again requested proposed orders and attorney's fee affidavits. **R_____** (January 27, 2021 hearing transcript at 33–35).

On February 10, 2021, counsel for Mrs. Beatty submitted a *new* proposed order and a *second* affidavit of attorney's fees with revised backup documentation. TCC did not raise any objections to Mrs. Beatty's new proposed order and attorney's fees affidavit. In fact, sixteen (16) days after Mrs. Beatty submitted these filings to the Master, and ten (10) days after his order awarding fees had been electronically filed, counsel for TCC emailed the Master and expressly declined to request a hearing, telling the Master, "We refrain, if you need us to say more then let us know." **R_____** (Atty Epting's February 26, 2021 email to Judge Scarborough). On March 11, 2021, TCC filed its notice of appeal. **R_____** (TCC's Notice of Appeal). The next day—and twenty-four (24) days after the Master's February 16, 2021 Order—TCC filed its Motion for Reconsideration and/or Clarification pursuant to Rules 59 and 60, SCRCP. **R_____** (TCC's Motion for Reconsideration and/or Clarification). On March 26, 2021, the Master denied TCC's motion

finding that it TCC's Rule 59(e) motion was untimely as to Mrs. Beatty. **R___**(Judge Scarborough's March 26, 2021 Order).

i. TCC never requested to be heard regarding the fees submitted to the Master by Mrs. Beatty's counsel on February 10, 2021.

Any issue related to the reasonableness of the Master's attorney's fee award to Mrs. Beatty was not preserved for review by this Court, because TCC failed to raise the issue before the Master. At the January 27, 2021 hearing, TCC made no mention of Mrs. Beatty's fees. The Master instructed counsel for Mrs. Beatty and the HPR to submit attorney's fee affidavits reflecting time they devoted to defending TCC's mechanic's lien claim through February 1, 2021. **R_____** (January 27, 2021 Hearing Transcript at 35). Thereafter, counsel for Mrs. Beatty submitted its affidavit for attorney's fees to the Master along with the supporting time records. **R_____** (Judge Scarborough's February 16 Summary Judgment Order at 15).

TCC never asked to be heard in response to Mrs. Beatty's submitted attorney's fees. Only after the Master's February 16, 2021 Order granting summary judgment to Mrs. Beatty was filed did TCC mention a hearing on the "quantum of fees." **R_____** (Atty Epting's February 26, 2021 email to Judge Scarborough). However, in that email, TCC expressly declined to request a hearing, telling the Master, "We refrain, if you need us to say more then let us know." **R_____** (Atty Epting's February 26, 2021 email to Judge Scarborough). "If the party is not *reasonably clear* in his objection to the perceived error, he waives his right to challenge the erroneous ruling on appeal. *Buist v. Buist*, 410 S.C. 569, 575, 766 S.E.2d 381, 384 (2014) (emphasis added). TCC, conversely, was *reasonably clear* in its express declination of a hearing on attorney's fees. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been *raised* to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (emphasis added). Here, TCC failed to preserve any issue related to the reasonableness of the

Master's award of attorney's fees to Mrs. Beatty, because it expressly declined to raise the issue prior to the Master's ruling or thereafter through a timely Rule 59(e) Motion.

- ii. *TCC failed to preserve any issue related to the reasonableness of the Master's attorney's fee award to Mrs. Beatty because it cannot raise the issue for the first time in a Rule 59(e) motion.*

TCC failed to raise any challenge to Mrs. Beatty's February 10, 2021 attorney's fee affidavit to the Master before he ruled and could not raise it for the first time in an untimely post-trial motion. Several weeks after the Master entered his order awarding Mrs. Beatty attorney's fees, TCC filed an untimely Rule 59(e) Motion raising for the first time the issue of the Master's February 10, 2021 attorney's fee award to Mrs. Beatty. **R_____** (TCC's Motion for Reconsideration and/or Clarification). Notwithstanding the fact that TCC's motion was untimely and thus invalid, TCC has not preserved for review its objection to the Master's fee award, because an issue cannot be raised for the first time in a motion to reconsider. *Johnson v. Sonoco Prods., Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009). In *Kitchen Planners*, this Court addressed an almost analogous scenario. 432 S.C. at 286, 851 S.E.2d at 724 In that case, the appellant, like TCC here, "failed to challenge the [respondent]'s submission of the fee affidavit during the summary judgment hearing and challenged the contents of the fee affidavit for the first time in its Rule 59(e), SCRPC, motion." *Id.* This Court properly ruled that the appellant's challenge to "the sufficiency and contents of the fee affidavit" was not preserved and affirmed the circuit court's award of attorney's fees. *Id.* Like the appellant in *Kitchen Planners*, TCC failed to preserve any issue related to the reasonableness of the Master's attorney's fee award to Mrs. Beatty. As such, this Court must affirm the Master's award, as TCC has not preserved this issue for this Court's review.

iii. *TCC's Rule 59(e) motion for reconsideration on the issue of attorney's fees was untimely.*

Assuming *arguendo*, that TCC had properly raised—or raised at all—any issue related to the reasonableness of the Master's attorney's fee award to Mrs. Beatty, it failed to preserve the issue for review by this court, because its Rule 59(e) Motion was dismissed as untimely and not substantively ruled on. Thus, any issue raised in that untimely motion was not preserved for appeal.

TCC filed its notice of appeal of the Master's February 16, 2021 Order on March 11, 2021. **R____** TCC's Notice of Appeal). The next day, apparently realizing that it failed to preserve the issue related to the Master's award to Mrs. Beatty, TCC filed a Motion for Reconsideration and/or Clarification pursuant to Rules 59(e), 60(a), and 60(b), SCRPC. **R____** (TCC's Motion for Reconsideration and/or Clarification). This post-trial motion came twenty-four (24) days after the Master's Order and fourteen (14) days after expressly declining a hearing on reasonableness of the Master's attorney's fees award. TCC failed to seek leave of this Court to proceed with that motion as required under Rules 60(a) & (b)(5), SCRPC and does not enjoy the benefit of the Supreme Court's holding in *Hudson v. Hudson*, 290 S.C. 215, 349 S.E.2d 341 (1986) since its Rule 59 Motion was untimely.

If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (citing Rule 59(e), SCRPC). This motion must be timely served “not later than 10 days after receipt of written notice of the entry of the order.” Rule 59(e), SCRPC. Issues presented in untimely post-trial motions are not preserved for appeal, because they were not timely raised and thus not ruled upon. *Nelson v. Nelson*, 428 S.C. 152,178 n.4, 833 S.E.2d 432, 446 n.4 (Ct. App. 2019). After all, “there must be finality, a time when the case in the trial court is really over and

the loser must appeal or give up[.]” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 20, 602 S.E.2d 772, 778 (2004) (citations omitted).

(B) Assuming *arguendo* that TCC preserved the issue of attorney’s fees for appeal, the Master correctly awarded fees to Mrs. Beatty as the prevailing party and did not abuse his discretion in the amount of fees awarded to Mrs. Beatty.

Assuming *arguendo* that TCC preserved any issue related to the Master’s award of attorney’s fees by actually, properly, and timely raising the issue, this Court should affirm the Master’s award of attorney’s fees to Mrs. Beatty, because Mrs. Beatty was “the prevailing party” under the mechanic’s lien statute and because the Master did not abuse his discretion in the amount of fees awarded to Mrs. Beatty.

i. Mrs. Beatty is the prevailing party under the mechanic’s lien statute, and TCC’s status as the “prevailing party” in its contract claim in arbitration is irrelevant when applying the mechanic’s lien statutes attorney’s fee provision.

Mrs. Beatty is entitled to her attorney’s fees as the prevailing party under the Mechanic’s Lien Statute. *See* S.C. Code Ann. § 29–5–10(b). “Clearly, under the statute a party is entitled to recover attorney’s fees if she prevails in defending against the lien.” *Utilities Const. Co.*, 321 S.C. at 250, 468 S.E.2d at 4. Mrs. Beatty successfully defended against TCC’s claim by showing that its lien dissolved as a matter of law and that there was no lien to foreclose upon. Therefore, she is the prevailing party and entitled to attorney’s fees. *Id.* (holding the question of the prevailing party’s entitlement to attorney’s fees is not discretionary).

Before the Master, TCC sought to advance the position that it is entitled to attorney’s fees on a theory that it was the prevailing party in its contract arbitration against the HPR. **R_____** (TCC’s September 11, 2020 Motion for Attorney’s Fees). TCC continues to conflate, either inadvertently or by design, the meaning of “prevailing party” under the specific terms of the

mechanic's lien statute with its limited status as the prevailing party in the arbitration of its breach of contract claim with the HPR. The fact that TCC prevailed upon its contract claim in arbitration entitles it to certain costs associated with that arbitration dispute and nothing more. Prevailing in arbitration does not give TCC its *ipso facto* status as the "prevailing party" in this mechanic's lien foreclosure action. To quote from TCC's own brief, "Caselaw limits the recovery of fees to *only* those incurred in successfully defending the lien foreclosure action[.]" (TCC's Initial Brief at 26) (citing *Utilities Construction Co.*, 321 S.C. at 250, 468 S.E.2d at 4 (emphasis in the original)).

TCC prevailed in its contract arbitration against the HPR. TCC has no contractual right to attorney's fees. It has no contract with Mrs. Beatty. Mrs. Beatty prevailed on the mechanic's lien claim. As described in *Utilities Construction, Co.*, Mrs. Beatty would be entitled to her fees even if TCC had prevailed upon a contract claim against her. 321 S.C. at 244, 468 S.E.2d at 1.

ii. *The award of fees in mechanic's lien actions is mandatory; however the amount of fees awarded is discretionary as indicated by the Master's decision to limit Mrs. Beatty's fee award.*

Even though TCC did not preserve the reasonableness of the Master's award of attorney's fees to Mrs. Beatty for review, the Master did not abuse his discretion in the amount of fees awarded to Mrs. Beatty. TCC falsely claims that Mrs. Beatty "she requested and received \$76,000.00" in fees (TCC's initial brief at 31). Mrs. Beatty sought \$78,453.50 in fees and \$1,133.26 in costs. **R_____** (Judge Scarborough's February 16, 2021 Summary Judgment Order). The Master reviewed the fee affidavit and corresponding unredacted time entries submitted by counsel for Mrs. Beatty *in camera* and thoroughly evaluated both under the six reasonableness factors articulated in *Jackson v. Speed*: 1) the nature, extent, and difficulty of the case; 2) the time necessarily devoted to the case; 3) the professional standing of counsel; 4) the contingency of compensation; 5) the beneficial results obtained; and 6) the customary legal fees for similar

services. 326 S.E. at 289, 486 S.E.2d at 750. As noted in the fee affidavit and counsel for Mrs. Beatty's December 3, 2020 letter to the Master, counsel focused solely on TCC's mechanic's lien claim and "intentionally did not move for summary judgment on TCC's breach of contract or 'Equity' causes of action, so there would be no argument that fees incurred in seeking dismissal of those claims should be excluded." R___ (Atty Buckley's December 3, 2020 letter to Judge Scarborough). The Master, in his reasoned discretion and after clearly explaining the basis for his award, awarded Mrs. Beatty fees of \$75,000.00 and costs of \$1,000.00 in his February 16, 2021 Order. R___ (Judge Scarborough's February 16, 2021 Summary Judgment Order).

Finally, in the penultimate page of its Initial Brief, TCC makes one final misrepresentation by asserting that Mrs. Beatty received the *entirety* of her fee request stating that "she requested and received \$76,000.00" (TCC's initial brief at 31). TCC then seeks to challenge the contents of Mrs. Beatty's fee affidavit including time entries from 2016–2019 when the foreclosure action was stayed. (*Id.*)

The undersigned for Mrs. Beatty stated in his fee affidavit that his firm had incurred \$79,586.76 in combined fees and expenses defending against TCC's foreclosure action *not* \$76,000.00. Contrary to TCC's unfounded allusion, the Master did not simply rubber stamp counsel for Mrs. Beatty's attorney's fee request. Rather, the Master, using his reasoned discretion, *reduced* Mrs. Beatty's fees by four and a half percent (4.5%). R___ (Judge Scarborough February 16, 2021 Summary Judgment Order and February 24, 2021 Form 4 Order). In fact, and again contrary to the argument TCC presents to this Court, the Master did not award fees for the entire period while the foreclosure action was stayed. The Master clearly states in his March 26, 2021 Order denying TCC's untimely Rule 59(e) motion that: "I would note that almost all the attorney's fees awarded to Betty Beatty were incurred after the claim for attorneys [sic] fees was filed by

Plaintiff. I have given her credit for filing the answer to the initial complaint and *awarded no fees while the matter was stayed during the arbitration proceeding.*” **R___** (Judge Scarborough’s March 26, 2021 Order). Mrs. Beatty is entitled to attorney’s fees as the prevailing party and this Court should affirm his award because TCC failed to preserve its objections for appeal, and the Master properly exercised his discretion in determining the amount of Mrs. Beatty’s fees he awarded.

IV. ADDITIONAL SUSTAINING GROUNDS

TCC’s second issue on appeal argues that the Master erred by refusing to allow TCC to amend the date in its statement of account and retroactively perfect its lien because, despite swearing to it four (4) times, TCC actually meant that March 17, 2016 was the date of *substantial completion* and not, as it swore, the date of last work. The Master ruled that statements of account were not pleadings that could be amended either under § 29–5–100 or Rule 15, SCRCF and that TCC was bound by its prior verified pleadings. **R___** (Judge Scarborough’s February 16, 2021 Summary Judgment Order).

Under Rule 208(b)(2), SCACR, the “[r]espondent’s brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c), [SCACR].” Rule 220(c), in turn, provides that “[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal.” *See also I’On*, 338 S.C. at 418, 526 S.E.2d at 722. Here, an additional sustaining ground before the Court is that the affidavits used by TCC to retroactively claim that March 17, 2016 was actually the date of substantial completion and not last work were sham affidavits. As such, they could not be used by TCC to create an issue of material fact necessary to oppose Mrs. Beatty’s motion for summary judgment or used by TCC to contradict its prior sworn statements in order to create a basis for disputing the last day of work, amending its statement of account, or retroactively perfecting its untimely lien.

(A) The Master’s Order granting Mrs. Beatty’s motion for summary judgment must be affirmed because TCC could not use a sham affidavit to create a question of material fact as to the date of last furnishing.

At the November 5, 2020 hearing on Mrs. Beatty’s Motion for Summary Judgment, counsel for Mrs. Beatty addressed the issue of Mr. Tomberlin’s May 22, 2020 Affidavit and Mr. Griffith’s September 25, 2020 affidavit, which TCC has cited in its brief. **R ___**(November 5, 2020 hearing transcript). Both of these affidavits testified to the fact that, contrary to the prior four (4) sworn statements, TCC actually meant that March 17, 2016 was the date of *substantial completion* and not the date of last furnishing of work or materials. **R ___**(May 22, 2020 Affidavit of Ryan Tomberlin and September 25, 2020 Affidavit of John David Griffith). Specifically, counsel for Mrs. Beatty argued below that TCC could not use these affidavits to both retroactively perfect its expired lien and create an issue of material fact necessary to defeat Mrs. Beatty’s Motion for Summary Judgment because both were sham affidavits. **R ___**(November 5, 2020 hearing transcript at 28–39). TCC now seeks to use the same affidavits to establish that the “Date of Last Work is Uncontested,” disregarding the fact that the only point at which it became contested was when TCC sought to submit these sham affidavits contesting *its own prior testimony*. TCC Initial Brief at 8).

As noted extensively *infra*, a verified complaint is not a pleading whose facts are subject to simple amendment like a normal complaint.¹⁰ *Dawkins*, 354 S.C. at 58, 580 S.E.2d at 433. Moreover, it is axiomatic that a party cannot create an issue of fact by contradicting its prior sworn testimony. *See infra*. Mrs. Beatty argued below that this was exactly what TCC was trying to do before the Master. **R ___**(November 5, 2020 hearing transcript). In advancing that argument, counsel for Mrs. Beatty walked the Master through this Court’s decision in *McMaster v. Dewitt*, 411 S.C. 138, 148,

¹⁰ TCC has never addressed the evidentiary and testimonial value of its prior sworn statements below or before this Court.

767 S.E.2d 451, 456 (Ct. App. 2014) for determining the factors to be considered when a party files what is claimed to be a sham affidavit. **R__** (November 5, 2020 hearing transcript at 28–35). The Master did not rule upon that issue but the record below demonstrates that each of the *McMaster* factors support a finding that the affidavits should not be considered.

This Court has set forth six factors to be considered in differentiating between a sham affidavit and a correcting or clarifying affidavit: (1) Whether an explanation is offered for the statement that contradicts prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the non-movant had access to the fact prior to the previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; and (6) when, in relation to summary judgment, the second affidavit is submitted. *McMaster*, 411 S.C. at 138, 767 S.E.2d at 451.

i. TCC has not offered an explanation for its contradicting sworn statements.

As to the first *McMaster* factor, TCC has offered no explanation for contradicting Mr. Griffith’s multiple sworn statements as to the last date labor or materials were supplied. Mr. Griffith has provided no affidavit explaining why his prior sworn testimony should not bind his company. He simply states, “When I signed the statement of account, I referred to the date of substantial completion.” **R_____** (September 25, 2020 Affidavit of John David Griffith). Additionally, the affidavit of Ryan Tomberlin sidesteps this factor, simply stating: “TCC believed substantial completion of the project was March 17, 2016.” **R_____** (May 22, 2020 Affidavit of Ryan Tomberlin). The prior sworn statements of TCC’s president make no mention of the term “substantial completion” and, instead, unequivocally attest that “[T]he last day work was

performed or materials provided to the property was *March 17, 2016.*” **R___**(TCC’s Verified Complaint & Verified Amended Complaint) (emphasis added). At the time he submitted his affidavit, both the Panel of Arbitrators and Judge Jefferson had found that the date of substantial completion was March 8, 2016, *not* March 17, 2016. **R___**(Arbitration Panel’s Award, Corrected Award, and Judge Jefferson’s Order Denying Motion to Vacate). Therefore, TCC has failed to provide an explanation for its contradictory statements.

- ii. *The date of last work is central to this litigation and outcome determinative as to whether or not TCC’s lien dissolved by operation of law.*

As to the second *McMaster* factor concerning the importance of the contradictory fact to the litigation, the date on which TCC last worked on the project is central to the perfection of its lien. When TCC attested on the public record to the March 17 date in its June 6, 2016 Verified Complaint and statement of account, it knew it had ten (10) days to serve its lien. Interestingly, Mr. Griffith verified the statement of account on May 19, 2016. **R___**(TCC’s Statement of Account dated May 19, 2016 attached as Exhibit “A” to its Verified Complaint). From that date, TCC had ample time to serve Mrs. Beatty, yet TCC has not provided a reason why it waited *eighteen* (18) days to file its Verified Complaint and statement of account. Moreover, when TCC filed its Amended Verified Complaint and the second statement of account adding all of the unit owners four days later, it was fully aware that it had approximately a week to preserve its lien by serving Mrs. Beatty. The date of last work is crucial to this mechanic’s lien foreclosure action and all mechanic’s liens.

- iii. *TCC cannot claim it did not have access to the information it now contradicts.*

The third *McMaster* factor considers whether TCC had access to the facts prior to the previous sworn testimony. TCC obviously had access to the information needed to establish when its work was performed at the project prior to the filing of the Griffith sworn statements. Here,

TCC cannot contend that at the time of Mr. Griffith's four (4) sworn statements it did not or could not know what work it was doing at the project and when. After all, his September 28, 2020 Affidavit clearly states: "I was involved with Concord and Cumberland project from its beginning, and I signed the verified complaint and the statement of account relating to the project."

R_____ (September 25, 2020 Affidavit of John David Griffith).

iv. TCC's last minute affidavits varied greatly from its four (4) prior sworn statements.

The fourth *McMaster* factor, the frequency and degree of variation between the prior sworn statements and the proffered affidavit weighs in favor of excluding the Tomberlin affidavit. TCC has previously sworn on four (4) occasions that March 17, 2016 was the date of last furnishing. The two affidavits TCC submitted ahead of the hearings on Mrs. Beatty's Motion for Summary Judgment varied greatly from the *original* testimony submitted by TCC's president four (4) years earlier, as they change the "last day of work" to "substantial completion."

v. TCC's President was not confused when he made his four (4) prior attestations.

As to the fifth *McMaster* factor, there is no indication that Mr. Griffith was confused when he attested on each of the prior four (4) occasion to the date of last labor or materials at the project. Mr. Griffith made his first attestation on May 19, 2016 and his second attestation on June 10, 2016. **R_____** (TCC's Verified Complaint and Verified Amended Complaint). Surely, had he been confused for any reason, he would have realized it during this *twenty-two* day period. Regardless, TCC has made no effort to inform the Court why it should allow his prior testimony to be contradicted, especially where the law of the case is that substantial completion occurred on March 8, 2016, not March 17. **R_____** (Arbitration Panel's Award, Corrected Award, and Judge Jefferson's Order Denying Motion to Vacate).

- vi. *TCC submitted these affidavits four years after its prior attestations and only after Mrs. Beatty moved for summary judgment on the issue of untimely service.*

With regard to the final *McMaster* factor addressing when in relation to summary judgment the affidavit was filed, Mr. Tomberlin affidavit was submitted six (6) days before the hearing on Mrs. Beatty's Motion scheduled before Judge McCoy. Mr. Griffith's Affidavit and the Heather Dagg summary were filed a month and nine (9) days, respectively, prior to the Master's hearing on Mrs. Beatty's Motion.¹¹ **R___** (May 22, 2020 Affidavit of Ryan Tomberlin, September 28, 2020 Affidavit of John David Griffith, and TCC's Memorandum in Opposition to Mrs. Beatty's Motion for Summary Judgment Exhibit "D"). Taking the timing of these submissions in the light most favorable to TCC, they only indicate a last minute attempt to create a genuine issue of material fact and to retroactively revive a lien that dissolved four years previously. As such, this Court should find that all six *McMaster* factors weigh against the consideration of these affidavits and affirm the Master's Order on this additional sustaining ground.

CONCLUSION

For the reasons set forth above, the Master's February 16, 2021 Order granting Mrs. Beatty's Motion for Summary Judgment should be affirmed.

(Signature on next page)

¹¹ At the November 5, 2020 hearing, the Master ruled that the Dagg summary was not admissible as a summary under Rule 1006, SCRE, because the underlying data had never been produced. **R___** (November 5, 2020 Hearing Transcript at ___). TCC has not appealed that ruling.

(Signature page for Initial Brief of Respondent Appellate Case No. 2021-000272)

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Dated: August 9, 2021

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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Charleston County
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge
Mikell R. Scarborough, Circuit Court Judge

Case No. 2016-CP-10-02955
Appellate Case No. 2021-000272

TCC of Charleston, Inc.,

Appellant/Respondent,

v.

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

Respondents,

Of which Concord & Cumberland HPR is the

Respondent/Appellant.

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I, Edward D. Buckley, Jr., of Clement Rivers, LLP, counsel for Respondent Betty L. Beatty, do hereby certify that the foregoing **INITIAL BRIEF OF RESPONDENT** was served on all other parties to this matter on August 9, 2021, via email (see attached) to their counsel of record:

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Dated: August 9, 2021

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Subject: TCC of Charleston, Inc. v. Concord & Cumberland; Appellate Case No. 2021-000272
Attachments: RDOM.pdf; RIB.pdf

Enclosed for service upon you in the above-referenced matter please find the Initial Brief and Designation of Matter of Respondent Betty L. Beatty which we intend to file today.

Thank you,
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