THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
In The Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2012-CP-40-7752
Appellate Case No. 2014-000377

DRV Fontaine, LLC,.....Respondent,

v.

Fontaine Business Park, LLC, Fontaine Business Park 2, LLC,
Fontaine Business Park 3, LLC, Fontaine Business Park 4, LLC,
Fontaine Business Park 5, LLC, Fontaine Business Park 6, LLC,
Fontaine Business Park 7, LLC, Fontaine Business Park 8, LLC,
Fontaine Business Park 9, LLC, Fontaine Business Park 10, LLC,
Fontaine Business Park 11, LLC, Fontaine Business Park 12, LLC,
Fontaine Business Park 13, LLC, Fontaine Business Park 14, LLC,
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Fontaine Business Park 25, LLC, Fontaine Business Park 26, LLC,
Fontaine Business Park 27, LLC, Fontaine Business Park 28, LLC,
Fontaine Business Park 29, LLC, Fontaine Business Park 30 , LLC,
Fontaine Business Park 31, LLC, ... Appellants.

RESPONDENT'S REPLY TO APPELLANTS' RETURN TO
RESPONDENT'S MOTION TO DISMISS

The Appellants' (Fontaine's) return to Respondent's (DRV's) motion to dismiss presents no valid argument against DRV's motion to dismiss. Indeed, Fontaine has essentially conceded that the motion to dismiss should be granted.

I. Fontaine's argument based on the general rule that one judge cannot overrule another is not preserved for appeal, and it is manifestly without merit.

Fontaine argues that DRV has misunderstood the argument in its Brief of Appellant and that DRV is "incorrect in its contention that [Fontaine] did not preserve [its] challenge to Judge Cooper's ruling on the Motion for Order of Reference." (Ret. at 2). Fontaine argues that "with respect to Judge Cooper's contravention of Judge Lee's prior order, [Fontaine is] challenging Judge Cooper's order on the previously-considered Motion for Order of Reference – *not whether Judge Lee's order precluded Judge Cooper from a determination of the related jury trial question.*" (Id.)(emphasis added).

An argument based on the rule that one judge cannot overrule another is not preserved for appeal unless the issue was first raised to the trial court. *Mann v. Walker*, 328 S.E.2d 659, 661 (S.C. App. 1985). Here, Fontaine never argued *to Judge Cooper* that *anything* in Judge Lee's prior order precluded Judge Cooper from ruling on *any* issue, including the issue referring the matter to the master. (See Motion, Tabs C and D, *passim*). Thus, Fontaine's argument that Judge Cooper could not rule on the issue of whether this case should be referred to the master is not preserved for appeal. Indeed, Fontaine never argues in its Return that it made any such argument *to Judge Cooper* – it simply argues that it has made such an argument in its Brief of Appellant. (Ret. at 2). Thus, Fontaine has essentially conceded that its argument is not preserved for appeal.

In addition, Fontaine has conceded in its Return that is not arguing that Judge Lee's order precluded Judge Cooper from ruling on the question of whether Fontaine had a right to a jury trial on its counterclaims. (See emphasized quote above from Fontaine's Return). This concession removes this case from the general rule that one judge cannot overrule another, because that rule does not apply if the subsequent request for relief is based on facts or legal theories not ruled upon in the prior order by the other circuit court judge. *Id.*; *accord Salmonsen v. CGD, Inc.*, 661 S.E.2d

81, 88 (S.C. 2008); *Binkley v. Burry*, 573 S.E.2d 838, 843 (S.C. App. 2002); *Andrick Dev. Corp. v. Maccaro*, 311 S.E.2d 95, 97 (S.C. App. 1984). If Fontaine does not have a right to jury trial on its counterclaims, and it does not as found by Judge Cooper and as established by the unchallenged law of this case (see Arg. II, *infra*), then this presents a different legal and factual basis for referring the case to the master, including the counterclaims. Since Fontaine had no right to a jury trial, Judge Cooper was free to refer the entire case to the master "upon application of any party or upon [his] own motion." Rule 53(b), SCRCP; see also Rule 71(a), SCRCP (foreclosure actions "shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53").

II. Judge Cooper's unchallenged ruling that Fontaine is not entitled to a jury trial on its claims and defenses because those claims and defenses did not change the equitable nature of this foreclosure action is the law of this case and *requires* affirmance.

In paragraphs numbered 3-6 at pages 3-5 of its Return, Fontaine argues that it has challenged Judge Cooper's ruling under *Collier v. Green*, 137 S.E.2d 277 (S.C. 1964) that, "[e]ven without the express jury trial waivers," Fontaine had no right to a jury trial on its defenses and counterclaims, because "such claims and defenses do not change the equitable nature of the foreclosure action." (Tab A at 6-9). As shown below, Fontaine has failed to show any challenge to Judge Cooper's ruling.

Paragraph 3: Here, Fontaine quotes a single paragraph from its 27-page brief as proof that it has challenged Judge Cooper's ruling. (Ret. at 3). That paragraph is the first paragraph under the following argument heading:

> C. [DRV] failed to show that [Fontaine's] counterclaims, which exist independently of the contractual relationship between the parties, are encompassed by the *limited jury trial waivers*.

(Motion To Dismiss, Tab B at 21) (emphasis added). The argument heading demonstrates that this argument pertains to Judge Cooper's ruling that Fontaine contractually waived its right to a

jury trial in the loan documents. That ruling is not the basis for to the instant motion to dismiss – the basis for the motion to dismiss is whether Fontaine has challenged Judge Cooper's independent and alternative ruling under *Collier, supra.*

The first sentence of the quoted paragraph states as follows: "The trial court erred in concluding that [Fontaine was] not entitled to a jury trial on [its] counterclaims – presumably because [DRV] was first to file a complaint." (Ret. at 3). DRV never argued, and Judge Cooper never found, that Fontaine lost any right to a jury trial because DRV filed its complaint before Fontaine made its counterclaims. This "first to file" argument is simply irrelevant here.

In the next three sentences of the quoted paragraph, Fontaine notes that DRV's attorney argued that Fontaine's counterclaims did not change the equitable nature of the foreclosure action, and then argues that DRV's attorney did not understand the "governing law." (Ret. at 3). None of this is relevant to the question of what was the ruling of the trial court or the question of whether Fontaine has challenged the trial court's ruling on appeal.

In the next sentence of the quoted paragraph, Fontaine asserts the following: "The equitable nature of this foreclosure action does not change the legal nature of [Fontaine's] counterclaims." (Ret. at 3). Judge Cooper, however, held under *Collier, supra* that the counterclaims were not legal claims (Tab A at 8) and therefore did not change the equitable nature of the foreclosure action. (Tab A at 9). Fontaine never challenges this ruling.

In the last sentence of the quoted paragraph, Fontaine asserts that the trial court erred based upon the Supreme Court's ruling in *Wachovia Bank Nat'l Ass'n v. Blackburn,* 755 S.E.2d 437 (S.C. 2014), quoting from that opinion as follows: "If the complaint is equitable and the counterclaim is legal and compulsory, the plaintiff or defendant has a right to a jury trial on the counterclaim unless a valid *jury trial waiver* exists that encompasses the counterclaim." (Ret. at

3)(emphasis added). The ruling in *Wachovia Bank*, however, related solely to the issue of whether the jury waiver provision in the loan documents applied to the borrower's counterclaims in the foreclosure action brought by the lender. Nothing in *Wachovia Bank* impacts the Supreme Court's analysis in *Collier, supra*, which was the sole basis for Judge Cooper's ruling that Fontaine had no right to a jury trial *even if* the jury trial waiver in the loan documents did not apply here.

In short, nothing in the paragraph quoted by Fontaine challenges Judge Cooper's ruling under *Collier*. Indeed, Fontaine never cites, mentions, nor discusses the Supreme Court's opinion in *Collier* anywhere in its brief (See Motion, Tab B, *passim*), and *Collier* was the sole basis for Judge Cooper's ruling that Fontaine has not challenged on appeal.[1]

Paragraph 4: Here, Fontaine argues that the following Statement of Issue challenges Judge Cooper's ruling under *Collier*: "A defendant in a foreclosure action is entitled to a jury trial on legal counterclaims in the absence of a valid waiver." (Ret. at 3). Fontaine supports this

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[1] Fontaine's reliance upon the Supreme Court's opinion in *Wachovia Bank* is a classic case of proving too much and further demonstrates that Fontaine's appeal should be dismissed or Judge Cooper's ruling should be summarily affirmed. In *Wachovia Bank*, the bank sued to foreclose its mortgage and the borrowers filed responsive counterclaims, demanding a jury trial. The bank moved to strike the jury trial demand based on a jury trial waiver in the loan documents, and the circuit court granted the motion. The borrowers appealed to this Court on two grounds: (1) the waivers themselves were invalid; and (2) the waivers did not apply to the counterclaims, because the counterclaims did not arise out of the loan documents. This Court rejected the first argument but accepted the second. See *Wachovia Bank*, 716 S.E.2d 454 (S.C. App. 2011). Here, Fontaine's only argument against Judge Cooper's ruling that the jury trial waivers were valid is that its counterclaims "arise from conduct that is not governed by the terms expressed with the four corners of the [loan documents]." (Tab B at 19; see generally Tab B at 16-25). In other words, Fontaine makes the same argument made by the borrowers in *Wachovia Bank* and accepted by this Court. The Supreme Court, however, reversed this Court and rejected the borrower's argument under the following analysis:

> 1. If the borrower was correct in arguing that its counterclaims were not related to the loan documents, then its counterclaims were permissive, and the assertion of them in a foreclosure action waived the right to a jury trial.
>
> 2. Alternatively, if the borrower was incorrect, then the waiver in the loan documents precluded the borrower's demand for a jury trial.

Wachovia Bank, 755 S.E.2d at 442-443. The same analysis applies here and, therefore, Judge Cooper's ruling on the waiver issue must be affirmed, even if one were to assume Fontaine has challenged Judge Cooper's ruling under *Collier, supra*, and even if one further assumed Judge Cooper erred in his ruling under *Collier*. Any such assumed errors do not affect the waiver issue.

argument by again relying on the Supreme Court's opinion in *Wachovia Bank, supra.* (Ret. at 3-4). Nothing in this Statement of Issue or in the Supreme Court's *Wachovia Bank* opinion relate to or impact upon the Supreme Court's ruling in *Collier* or Judge Cooper's ruling based on *Collier*. And, as noted in footnote 1, *supra*, the Supreme Court's ruling in *Wachovia Bank* itself requires that Judge Cooper's order be affirmed. The remainder of Fontaine's Paragraph 4 relates solely to Judge Cooper's ruling on the waiver issue, which is entirely distinct from his ruling under *Collier*.

Paragraph 5: Here, Fontaine argues the law of the case doctrine does not apply, because it has "excepted to all of Judge Cooper's rulings in *both* [its] Statement of the Issues on Appeal *and* [its] argument throughout [its] Initial Brief." (Ret. at 5)(emphasis in original). This sweeping statement fails to identify any Statement of Issue or any argument that challenges Judge Cooper's ruling under *Collier*. The reason is simple – Fontaine never argues against this ruling anywhere in its brief.

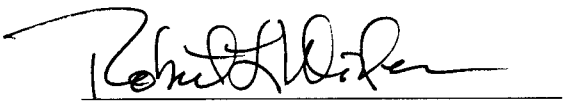
Also here, Fontaine recites the specific facts of *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544 (S.C. 1970). (Ret. at 4). Though unclear, it appears that Fontaine attempts to distinguish *Buckner* and its law of the case ruling as being "a one-page, *per curiam* decision from the South Carolina Supreme Court in 1970 that relates to the construction of an insurance contract." (Ret. at 4). The law of the case doctrine, however, is a firmly established principle of law that applies to all appeals – *Buckner* is simply one of the seminal decisions making it clear that an unchallenged alternative ruling is the law of the case and, right or wrong, requires affirmance.

Paragraph 6: Here, Fontaine again summarily asserts that it has challenged "all of Judge Cooper's rulings." (Ret. at 5). Again, however, Fontaine never points to anything specific in his brief that actually and specifically challenges Judge Cooper's ruling under *Collier*.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in DRV's Motion to Dismiss, it is respectfully submitted that this Court should dismiss this appeal or, in the alternative, should issue an order affirming the appealed order. Doing so will avoid the unnecessary waste of this Court's resources and the resources of the parties.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served the Respondent's Reply to Return to Motion to Dismiss, by placing a true and correct copy in the U.S. Mail, sufficient postage pre-paid to counsel at the addresses shown below, on September 2, 2014:

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Re: DRV Fontaine, LLC -v- Fontaine Business Park, LLC, et al.
Appellate Case No. 2014-000377

Dear Ms. Kitchings:

Enclosed for filing in the above cited case, please find the original and seven copies of the Respondent's Reply to Return to Motion to Dismiss. Please file the Reply in your office, and return the file stamped extra copy to me in the return envelope provided.

Respectfully yours,

McNAIR LAW FIRM, P.A.

Robert L. Widener

RLW/as
Enclosures

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