

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

73949

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

RECEIVED

OCT 23 2014

SC Court of Appeals

Case No. 2013-CP-40-2655
Appellate Case No. 2014-000963

Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Co., Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and others similarly situated
..... Appellants,

v.

Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund..... Respondents.

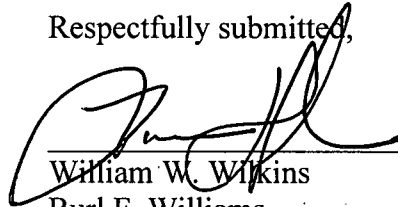
**RESPONDENTS' MOTION TO STRIKE A PORTION OF
APPELLANTS' REPLY BRIEF**

Respondents, by and through their undersigned counsel, move this Court to strike the first paragraph of Section III, on pages five and six, of the Initial Reply Brief of Appellants on the basis that Appellants have raised a new legal issue in their reply brief that was not raised in their opening brief.

The grounds for this Motion are set forth in more detail in the supporting memorandum of law filed contemporaneously herewith.

WHEREFORE, the Respondents respectfully request that the cited portion of the Initial Reply Brief of Appellants be stricken, and per Rule 240(b), SCACR, that all deadlines relating to the appeal be stayed pending a decision on the Motion.

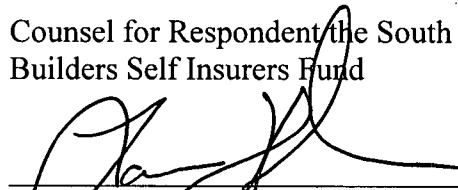
Respectfully submitted,



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**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO STRIKE
A PORTION OF APPELLANTS' REPLY BRIEF**

Respondents, by and through their undersigned counsel, hereby submit this Memorandum of Law in Support of their Motion to Strike a Portion of Appellants' Reply Brief, pursuant to Rule 240 of the South Carolina Appellate Court Rules. In support of their Motion, Respondents show unto this Court the following:

The Respondents have moved to strike the first paragraph of Section III, on pages five and six, of the Initial Reply Brief of Appellants on the basis that Appellants have raised a new

legal issue—the law of the case doctrine—in their reply brief that was not raised, directly or indirectly, in their opening brief.¹

In the referenced paragraph of Appellants' reply brief, Appellants, for the first time, raise the argument that the decision of Judge Manning in a prior action (2012-CP-40-4311) is the law of the case for the case at bar, a later-filed lawsuit. This Court and the Supreme Court have repeatedly explained that “[a]n appellant may not use the reply brief to argue issues not argued in the initial brief.” *Hunter v. Staples*, 335 S.C. 93, 103, 515 S.E.2d 261, 267 (Ct. App. 1999). See also *Chet Adams Co. v. James F. Pederson Co.*, 307 S.C. 33, 37, 413 S.E.2d 827, 829 (1992) (noting that issue raised for first time in reply brief is waived); *Fuller-Ahrens P'ship v. S.C. Dep't of Highways & Pub. Transp.*, 311 S.C. 177, 182, 427 S.E.2d 920, 923 (Ct. App. 1993) (“An appellant cannot argue new grounds for reversal by reply brief or oral argument.”); *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) (“An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief.”).

In this case, Appellants made no mention or reference to “the law of the case” in their opening brief. This argument is separate and distinct from the judicial estoppel argument raised in Appellants' initial brief and in their arguments at the court below. Indeed, Appellants made no mention or reference to “law of the case” in any arguments at the trial court. Furthermore, the cases cited by Appellants in support of this argument were not cited in Appellants' initial brief, and one of the cited cases, *Warren v. Yarborough*, is an unpublished decision.² Because this

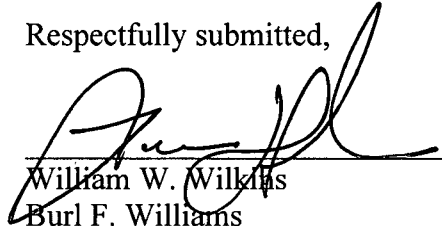
¹ In fact, this issue was raised for the first time ever in Appellants' reply brief. This issue was never presented to the lower court.

² Pursuant to Rule 268(d)(2), SCACR, “unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.” See also *Lanham v. Blue Cross and Blue Shield of South Carolina, Inc.*, 338 S.C. 343, 349, 526 S.E.2d 253, 256 (Ct. App. 2000) (noting that “unpublished opinions have no precedential value”).

argument is raised for the first time in a reply brief, Respondents are denied the opportunity to respond to this argument. Due to Appellants' failure to raise this argument in their initial brief, the argument is waived and must be stricken from the reply brief.

For the reasons set forth herein, the Appellants' arguments related to "the law of the case" should be stricken from the reply brief.

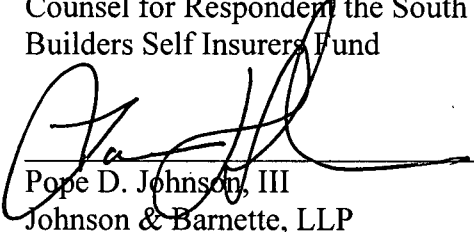
Respectfully submitted,



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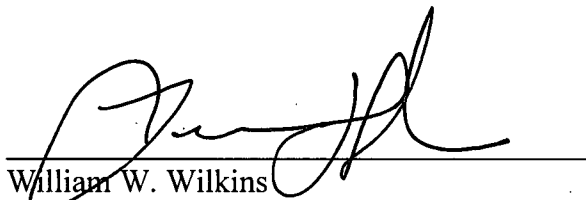
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PROOF OF SERVICE

The undersigned hereby certifies that on October 23, 2014, he served the foregoing **RESPONDENTS' MOTION TO STRIKE A PORTION OF APPELLANTS' REPLY BRIEF AND MEMORANDUM OF LAW IN SUPPORT** on all counsel of record by placing a copy in the United States Mail, first class postage prepaid, addressed as follows:

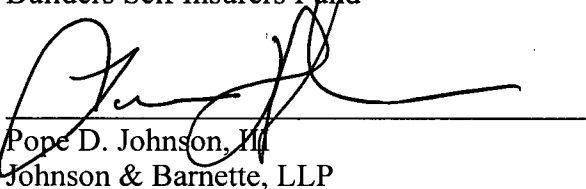
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October 23, 2014

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk, Court of Appeals
1015 Sumter Street
Columbia, SC 29211

**Re: Allen Patterson et al. vs. Herb Witter et al.
Appellate Case No. 2014-000963**

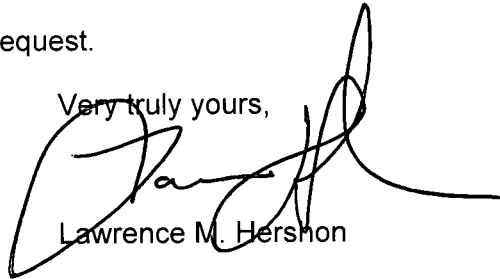
Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Respondents' Motion to Strike a Portion of Appellants' Reply Brief, Memorandum of Law in Support, and Proof of Service in the above-referenced case, along with a check for \$25.00 for the requisite filing fee. Please return a file-stamped copy of the Motion, Memorandum of Law, and Proof of Service to my courier.

By copy of this letter, I am today serving the Motion, Memorandum of Law, and Proof of Service on counsel for Appellants.

Thank you for your attention to this request.

Very truly yours,



Lawrence M. Hershon

LMH:dmc
Enclosure

cc: James E. Bradley, Esq. (w/enc.) – via U.S. Mail
S. Jahue Moore, Esq. (w/enc.) – via U.S. Mail
William W. Wilkins, Esq. (w/enc.) – via U.S. Mail
Burl F. Williams, Esq. (w/enc.) – via U.S. Mail
Pope D. Johnson, III (w/enc.) – via U.S. Mail

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