

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

G. Thomas Cooper, Jr., Circuit Court Judge

Appellant Case No. 2014-000963

Allen Patterson, Steve Tilton, Richard Sendler,
Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis,
Michel 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.

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

Appellants submit this Memorandum of Law in Opposition to Respondents'
Motion to Strike a Portion of Appellants' Reply Brief.

The Trustee Respondents move to strike the first paragraph of Section II of the
Initial Reply Brief which reads:

Respondents claim that they never intended for the trust code to apply to the Home Builder's Trust, but that they were simply offering an alternative legal theory for the court. (Respondents' Initial Brief, p.21; R. ____). The court, however, issued an order that states:

[The] Defendants have moved to dismiss on the basis of lack of subject matter jurisdiction. The Defendants argued that this lawsuit involved the internal affairs of the Trust such that it must be filed in the Probate Court under South Carolina Code Section 62-7-201.... **It is clear from the documents submitted to the Court that this dispute concerns a trust....** With this in mind, the Court dismisses this lawsuit without prejudice such that it may be refiled in Probate Court to cure any alleged defects in subject matter jurisdiction.

(Manning Order, R. ____) (emphasis added). The court, therefore, has issued an order that declares the Home Builder's Trust to be a trust and not an unincorporated association. "When reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law. The appellate court will not disturb the judge's findings of fact as long as they are reasonably supported by the evidence." *Epworth Children's Home v. Beasley*, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005). Respondents did not appeal this ruling by the court. An unappealed ruling, right or wrong, is the law of the case. *Georgetown Cnty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 357, 713 S.E.2d 287, 291 (2011); *see also Warren v. Yarborough*, 2012-UP-401, 2012 WL 10860503 (S.C. Ct. App. July 11, 2012) ("the probate court order dated November 20, 2007, wherein the court found Appellant had breached his duty as Trustee was not appealed by Appellant. Thus, the findings of the probate court ... are the law of the case.")

Respondents assert that the "law of the case" argument was not raised in the Initial Brief and in arguments to the lower court and ask for the entire paragraph to be stricken. However, the first portion of this paragraph cites the Respondents' Initial Brief, an Order from the court which is part of the Record on Appeal, and South Carolina law.

The Respondents focus on the last sentence, which references the "law of the case." This issue was raised in both Appellants' Initial Brief and to the trial court.

In the Appellants' Initial Brief, Appellants state:

Likewise, the Trustees cannot now claim that the Trust Fund is not a trust. The Trustees obtained an order from the court dismissing the previous lawsuit based on their factual assertion that the South Carolina Home Builders Self Insurers Fund was a trust.... ***They are bound by the assertion*** made in the previous lawsuit ***and the order which resulted.***

(Respondents Initial Brief, p. 8) (emphasis added). Thus, Appellants argue that Respondents are bound by their assertion that the trust is a trust and by Judge Manning's Order finding that the matter should be filed in Probate Court. The Appellants raised the legal doctrine of "law of the case" when they argued Respondents are bound by Judge Manning's Order on their motion.

In addition, law of the case and judicial estoppel are similar doctrines used together. The doctrine of law of the case, like res judicata and estoppel by judgment, is a legal theory which prevents a party from being forced to relitigate issues that have already been resolved by a binding adjudication. *Mickle v. Blackmon*, 255 S.C. 136, 141, 177 S.E.2d 548, 549 (1970). "The doctrine of the law of the case is similar, analogous, and akin to the doctrine of res judicata." 46 Am. Jur. 2d Judgments § 520 at 784 (1994). The Supreme Court of South Carolina has acknowledged that where a prior decision on appeal has become the law of the case, the questions therein decided are res judicata in subsequent proceedings. *See Huggins v. Winn-Dixie Greenville, Inc.*, 252 S.C. 353, 357, 166 S.E.2d 297, 299 (1969); *see also Sparks v. Atlantic Coast Line Railroad*, 109 S.C. 145, 145, 95 S.E. 344, 345 (1918) (where trial court has rendered judgment for one of

two defendants, and against the other, the judgment in favor of such defendant becomes res judicata on a subsequent trial on reversal of the judgment of the co-defendant).

The doctrine of the law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided. *Sloan Const. Co. v. Southco Grassing, Inc.*, 395 S.C. 164, 170, 717 S.E.2d 603, 606 (2011); *see also Warren v. Raymond*, 17 S.C. 163, 163 (1882) ("all points decided by the Court on appeal, or necessarily involved in what was decided, are res judicata and cannot be considered again in the cause"). Moreover, the law of the case doctrine encompasses both findings of fact and conclusions of law. *Ashy v. We Care Distributors, Inc.*, 289 S.C. 526, 528, 347 S.E.2d 123, 125 (Ct. App. 1986). A trial court's unappealed ruling, whether right or wrong, becomes the law of the case. *ML-Lee Acquisition Fund v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997); *Carolina First Corp. v. Whittle*, 343 S.C. 176, 190-91, 539 S.E.2d 402, 410 (Ct. App. 2001); *Larimore v. Carolina Power & Light Corp.*, 340 S.C. 438, 445, 531 S.E.2d 535, 539 (Ct. App. 2000); *Binding v. County of Georgetown*, 327 S.C. 107, 113, 490 S.E.2d 4, 7 (1997).

Respondents moved to dismiss the original lawsuit by asserting that the Fund was a trust and that it must be sued in Probate Court. Judge Manning granted the Respondents' motion. The Appellants then sued the Respondents in Probate Court and removed to Circuit Court. The Respondents now assert the trust is not a trust. Thus, Respondents obtained an order from Judge Manning dismissing the previous lawsuit based on their assertion that the South Carolina Home Builders Self Insurers Fund is a trust. Judge Manning agreed with them and ruled the trust was a trust.

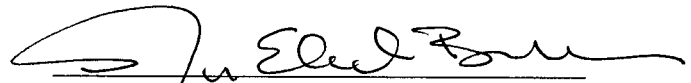
The issue was also raised in arguments to the lower court. In the January 14, 2014, argument to the trial court, attorney for the Appellants stated: "they already made a motion to dismiss our first lawsuit on the basis that it was a trust....They made that motion and Judge Manning granted it. He said I agree, it's a trust. You said it was a trust, I agree it's a trust....So they've already taken the position once that it was in that courtroom. One, how to remand it *and have an official finding on the record that it's a trust.*" (R. 103) (emphasis added). In that same hearing, counsel for the Respondents' stated: "They submitted an order that Judge Manning signed and it was within the jurisdiction of the probate court." (R. 112). The attorney for the Respondents' recognized that findings had been made in that order: "please please change the format of your order *because what is in that order are findings about it being a trust....*" *Id.* (emphasis added).

Respondents also take issue with a citation in the Appellants' Reply Brief on page 6. The citation of *Warren v. Yarborough* was introduced as *see also*. It was not the main citation, and was used to illustrate how rulings from probate courts have the same legal effect as those from circuit courts. The main citation of *Georgetown Cnty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 357, 713 S.E.2d 287, 291 (2011), establishes the same legal precedent, as do the following published cases: *ML-Lee Acquisition Fund, L.P.*, 327 S.C. at 241, 489 S.E.2d at 472; *Carolina First Corp.*, 343 S.C. at 190-91, 539 S.E.2d at 410; *Larimore*, 340 S.C. at 445, 531 S.E.2d at 539; *Binding*, 327 S.C. at 113, 490 S.E.2d at 7; *Professional Bankers Corp.*, 285 S.C. at 613, 331 S.E.2d at 365; *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, "right or wrong, is the law of this case and

requires affirmance.”); *Charleston Lumber Co. v. Miller Housing Corp.*, 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (finding that an unappealed ruling, right or wrong, is the law of the case and requires affirmance); *Mid-South Mgt. Co. Inc. v. Sherwood Development Corp.*, 649 S.E.2d 135 (S.C. App. 2007) (“A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case.”) (quoting *Austin v. Specialty Transp. Servs.*, 358 S.C. 298, 320, 594 S.E.2d 867, 878 (Ct. App. 2004)); *Bessinger v. BI-LO, Inc.*, 366 S.C. 426, 622 S.E.2d 564 (S.C. App. 2005).

The Appellants argued Judge Manning’s ruling that the trust is a trust to Judge Cooper as shown from the transcript. The Appellants raised the issue in their brief as shown on page 8 of the Initial Brief. Thus, this Court should deny the Respondents’ Motion to Strike because it is not in accord with the record on appeal.

Respectfully submitted,



James Edward Bradley, SC Bar # 66130
S. Jahue Moore, SC Bar # 4063
Margaret “Meg” Hazel, SC Bar # 100634
MOORE TAYLOR LAW FIRM, P.A.
P.O. Box 5709
West Columbia, SC 29171
803-796-9160

West Columbia, South Carolina

November 3, 2014

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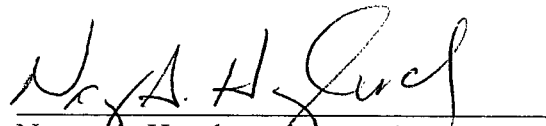
PROOF OF SERVICE

I certify that I have served the Memorandum of Law in Opposition to Respondents' Motion to Strike a Portion of Appellants' Reply Brief on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on November 3, 2014, addressed to their attorneys of record as follows:

Pope D. Johnson, III, Esquire
1230 Richland Street
Columbia, SC 29201

William W. Wilkins, Esquire
P.O. Drawer 10648
Greenville, SC 29603

Lawrence Hershon, Esquire
P.O. Box 1509
Columbia, SC 29202


Nancy A. Hazelwood

West Columbia, South Carolina

November 3, 2014