

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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

RECEIVED

NOV 10 2014

SC Court of Appeals

Allen Patterson, Steve Tilton, Richard Sandler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC, Tilton Group, Sandler 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.

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

Respondents hereby reply to Appellants' memorandum of law in opposition to the Respondents' Motion to Strike a Portion of Appellants' Reply Brief because that opposition misstates the law and contains unavailing arguments and contentions. Specifically:

1. Appellants' Initial Brief raises only the issue of judicial estoppel, and does not raise, by name or otherwise, the issue of law of the case.

Despite Appellants' attempts to equate those concepts, it is clear that the term of art "law of the case" is never raised in Appellants' Initial Brief or in arguments at the trial court, and the legal concepts of "judicial estoppel" and "law of the case" are not the same and are not

synonymous. The doctrines of “law of the case” and “judicial estoppel” are distinct principles under South Carolina law, and are not interchangeable. *See, e.g., Binkley v. Burry*, 352 S.C. 286, 294-96, 573 S.E.2d 838, 843-44 (Ct. App. 2002) (addressing arguments related to the two principles separately).¹

2. In their opposition to the Motion to Strike, Appellants seek to further confuse the real issue by also arguing that the terms “judicial estoppel” and “law of the case,” as well as “res judicata” and “estoppel by judgment,” all have the same meaning. Interestingly, Appellants quote American Jurisprudence for the statement that “The doctrine of the law of the case is similar, analogous, and akin to the doctrine of judicata.” However, Appellants fail to disclose to the Court that the treatise goes on, a mere two sentences later, to clarify that: “However, the doctrine of the law of the case is not identical with the doctrine of res judicata, but differs in many important respects, and is therefore distinguishable.” 46 Am. Jur 2d *Judgments* § 520 (1994) (see attached). It is undeniable that the law, in South Carolina and elsewhere, clearly recognizes the distinctions between the principles of law of the case, judicial estoppel, res judicata and estoppel by judgment. By having raised only one of those principles – a judicial estoppel – Appellants did not raise or preserve all of them in this appeal. Having failed to raise and preserve the issue of law of the case in its original brief, Appellants waived that argument. Therefore, the effort to raise it in reply fails and the argument must be stricken.

3. It must also be observed that the law of the case doctrine does not apply to the case at bar as urged by Appellants. As stated by the United States Supreme Court, the law of the case doctrine only applies to issues decided within the same case. *Messinger v. Anderson*, 225

¹ Law of the case stands for the proposition that a party is precluded from relitigating matters within the same case that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court. *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). Judicial estoppel, on the other hand, precludes a party from adopting a factual position in conflict with one earlier taken in the same or related litigation. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997).

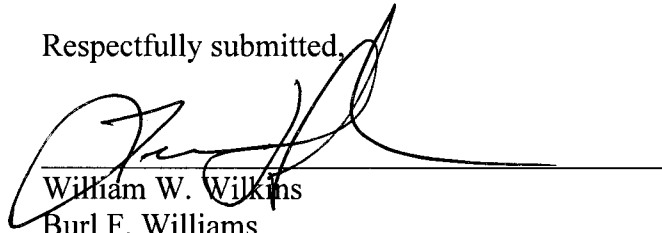
U. S. 436, 32 S. Ct. 739, 740 (1912) (The law of the case “applie[s] to the effect of previous orders on the later action of the court rendering them in the same case....”). In fact, a reading of each case cited by Appellants in support of their law of the case arguments reflects that in each instance the doctrine was applied only in context of a prior order or decision *within the same case*. None of the cases cited by Appellants involve an order from a separate, prior case somehow becoming the law of the case in a subsequent case. In this instance, Appellants seek to enforce an order in a separate, prior case as the law of the case in the instant action. Such an effort fails as a matter of law.

Not all unappealed orders become the law of the case. Appellants argue that an order granted in favor of the Respondents in a previous lawsuit should be applied in this case because Respondents did not appeal from that Order in the prior case. The Respondents, as the prevailing party, could not appeal the prior Order. It is a basic principle of law that a party cannot appeal from the granting of his own motion. *Mendelsohn v. Whitfield*, 312 S.C. 17, 26, 430 S.E.2d 524, 530 (Ct. App. 1993) *aff'd in part as modified*, 312 S.C. 226, 439 S.E.2d 845 (1994). Furthermore, Appellants did not appeal that Order; they chose to file the separate, instant action.

4. Because the terms “judicial estoppel” and “law of the case” are not interchangeable, it is clear that “law of the case” was never raised in the Initial Brief of Appellants, or in their arguments to the circuit court. The concepts of law of the case and judicial estoppel are separate and distinct, and by failing to raise the issue of “law of the case” in their Initial Brief, Appellants waived the right to raise such argument in their Reply Brief.

Therefore, for the reasons set forth in the Respondents’ Motion to Strike, and as set forth in this Reply, the Motion to Strike should be granted.

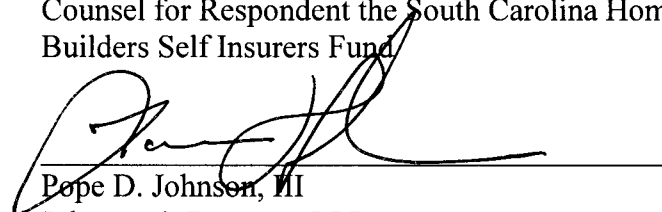
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November 10, 2014

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SECOND EDITION

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particular causes of action.⁵⁸ However, although there may be circumstances under which the doctrines of res judicata and of estoppel may both be applied,⁵⁹ the general principle of estoppel, while akin to, must be distinguished from, the doctrine of res judicata,⁶⁰ since the former is based upon conduct, or a representation, and the latter upon an adjudication.⁶¹

The doctrine of res judicata is related to the doctrine that one may not urge an inconsistent state of facts in different proceedings.⁶²

§ 519. —Collateral attack

There is some relationship between the doctrines of res judicata and collateral attack,⁶³ in that both doctrines involve the effect of a judgment in subsequent independent legal proceedings,⁶⁴ both doctrines involve the application of the rule of conclusiveness of judgments,⁶⁵ and both doctrines are based upon the public interest in the final adjudication of controversies.⁶⁶ There is a difference, however, in the impact of the two doctrines: the doctrine of res judicata is not operative in the case of a void judgment,⁶⁷ whereas the doctrine of collateral attack is concerned with the circumstances under which and the extent to which an earlier judgment may be impeached and shown to be invalid.⁶⁸

§ 520. —Law of the case

The doctrine of the law of the case is similar, analogous, and akin to the doctrine of res judicata.⁶⁹ Both doctrines are founded on a public policy against reopening that which has previously been decided.⁷⁰ However, the doctrine of

58. § 517.

59. *Hawley v Davenport, R. I. & N. W. R. Co.*, 242 Iowa 17, 45 NW2d 513; *Cianchette v Verrier*, 155 Me 74, 151 A2d 502.

60. *Cianchette v Verrier*, 155 Me 74, 151 A2d 502.

61. *Pack v McCoy*, 251 NC 590, 112 SE2d 118.

62. *Snouffer & Ford v Tipton*, 150 Iowa 73, 129 NW 345; *State ex rel. Gott v Fidelity & Deposit Co.*, 317 Mo 1078, 298 SW 83.

As to taking inconsistent positions in judicial proceedings, see 28 Am Jur 2d, Estoppel and Waiver §§ 69-75.

63. *Cobbs v Norville*, 227 Ala 621, 151 So 576; *James W. Glover, Ltd. v Fong*, 42 Hawaii 560.

64. *Cobbs v Norville*, 227 Ala 621, 151 So 576; *Lake v Bonyng*, 161 Cal 120, 118 P 535, error dismd 232 US 715, 58 L Ed 812, 34 S Ct 330.

65. 30 Am Jur 2d, Executions and Enforcement of Judgments § 550.

66. 30 Am Jur 2d, Executions and Enforcement of Judgments § 622.

67. § 564.

68. 30 Am Jur 2d, Executions and Enforcement of Judgments § 362.

69. *United States v United States Smelting Refining & Mining Co.*, 339 US 186, 94 L Ed 750, 70 S Ct 537, reh den 339 US 972, 94 L Ed 1379, 70 S Ct 994; *James W. Glover, Ltd. v Fong*, 42 Hawaii 560; *Westfall v Wait*, 165 Ind 353, 73 NE 1089; *Union Light, Heat & Power Co. v Blackwell's Adm'r (Ky)* 291 SW2d 539, 87 ALR2d 264, appeal after remand (Ky) 341 SW2d 261; *Continental Turpentine & Rosin Co. v Gulf Naval Stores Co.*, 244 Miss 465, 142 So 2d 200; *Mississippi College v May*, 241 Miss 359, 128 So 2d 557.

As to the doctrine of law of the case, see 5 Am Jur 2d, Appeal and Error §§ 744-759.

Law Reviews: Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multi District Litigation*. 135 U Pa LRev 595 (March, 1987).

70. *Mississippi College v May*, 241 Miss 359, 128 So 2d 557.

Both the doctrine of the law of the case and the doctrine of res judicata share the policy consideration of putting an end to litigation. *Rail N Ranch Corp. v State*, 7 Ariz App 558, 441 P2d 786.

the law of the case is not identical with the doctrine of *res judicata*,⁷¹ but differs in many important respects,⁷² and is therefore distinguishable.⁷³ The doctrine of the law of the case is more limited in its application,⁷⁴ as the doctrine of *res judicata* is not confined to matters of law, but is concerned extensively with issues of fact, and is not ordinarily concerned with subsequent proceedings in the same case, but with subsequent independent actions between the same parties or their privies.⁷⁵

§ 521. General application and limitations of doctrine

The doctrine of *res judicata* is a principle of universal jurisprudence, forming a part of the legal systems of all civilized nations.⁷⁶ The doctrine is firmly entrenched in the law,⁷⁷ as to those situations to which it is applicable.⁷⁸

Situations may arise, however, which call for exceptions, for example where the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate that issue in the earlier case.⁷⁹

71. *Rail N Ranch Corp. v State*, 7 Ariz App 558, 441 P2d 786; *Union Light, Heat & Power Co. v Blackwell's Adm'r* (Ky) 291 SW2d 539, 87 ALR2d 264, appeal after remand (Ky) 341 SW2d 261.

72. *Gohman v St. Bernard*, 111 Ohio St 726, 3 Ohio L Abs 10, 146 NE 291, 41 ALR 1057 (ovrld in part on other grounds by *New York Life Ins. Co. v Hosbrook*, 130 Ohio St 101, 3 Ohio Ops 138, 196 NE 888, 118 ALR 1283).

73. *Wichita Royalty Co. v City Nat'l Bank*, 306 US 103, 83 L Ed 515, 59 S Ct 420.

74. *Rail N Ranch Corp. v State*, 7 Ariz App 558, 441 P2d 786; *James W. Glover, Ltd. v Fong*, 42 Hawaii 560; *Continental Turpentine & Rosin Co. v Gulf Naval Stores Co.*, 244 Miss 465, 142 So 2d 200; *Mississippi College v May*, 241 Miss 359, 128 So 2d 557.

75. § 514.

76. *Gates v Mortgage Loan & Ins. Agency, Inc.*, 200 Ark 276, 139 SW2d 19; *Epstein v Chatham Park, Inc. (Super)* 52 Del 56, 153 A2d 180; *Jordan v Stuart Creamery, Inc.*, 258 Iowa 1, 137 NW2d 259; *Cianchette v Verrier*, 155 Me 74, 151 A2d 502; *C. I. T. Corp. v Turner*, 248 Miss 517, 157 So 2d 648.

77. *Goldsmith v M. Jackman & Sons, Inc. (CA10 Okla)* 327 F2d 184; *In re Estate of Richardson*, 250 Iowa 275, 93 NW2d 777.

78. *Van Brode Milling Co. v Kellogg Co. (DC Del)* 113 F Supp 845.

Res judicata is properly applied to issues of jurisdiction. *Hansen v American Nat'l Bank (Minn App)* 396 NW2d 642.

79. *Allen v McCurry*, 449 US 90, 66 L Ed 2d 308, 101 S Ct 411; *Industrial Com. of State v Moffat County School Dist. (Colo)* 732 P2d 616; *Gionfriddo v Gartenhaus Cafe*, 15 Conn App 392, 546 A2d 284, app gr, in part 209 Conn 809, 548 A2d 437 and affd 211 Conn 67, 557 A2d 540; *Helmuth v Life Ins. Co.*, 194 Ga App 685, 391 SE2d 412, cert den (Ga) 1990 Ga LEXIS 771, reconsideration den (Ga) 1990 Ga LEXIS 691; *People v Moore*, 138 Ill 2d 162, 149 Ill Dec 278, 561 NE2d 648; *Risken v Clayman (Iowa)* 398 NW2d 833; *State v Heigele*, 14 Kan App 2d 286, 789 P2d 218; *Board of Educ. v Gray (Ky App)* 806 SW2d 400; *Roberts v Troy*, 170 Mich App 567, 429 NW2d 206, app dismd (Mich) 482 NW2d 761; *Weaver v Pascagoula (Miss)* 527 So 2d 651; *Barkley v Carter County State Bank (Mo App)* 791 SW2d 906; *Higham v Red Lodge*, 247 Mont 400, 807 P2d 195; *Daigle v Portsmouth*, 129 NH 561, 534 A2d 689, remanded 131 NH 319, 553 A2d 291, appeal after remand 133 NH 498, 577 A2d 1236, costs/fees proceeding, remanded 137 NH 572, 630 A2d 776; *Slide-A-Ride v Citizens Bank*, 105 NM 433, 733 P2d 1316; *D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 563 NYS2d 24, 564 NE2d 634; *Commonwealth, Dep't of Transp. v Crawford*, 121 Pa Cmwlth 613, 550 A2d 1053; *Copper State Thrift & Loan v Bruno (Utah App)* 735 P2d 387, 55 Utah Adv Rep 44.

A finding by a court that an action on a note was fraudulent was not the equivalent of a finding that the suit was brought with malicious intent for purposes of collateral estoppel, and there was no full and fair opportunity to litigate issues in a later action on malicious prosecution. *Jordan v Lamb (Minn App)* 392 NW2d 607.

For a discussion of the exceptions to application of the doctrine, see § 562.

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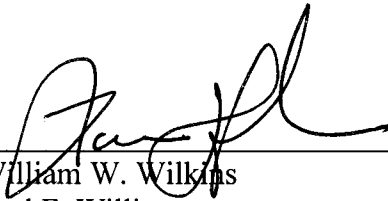
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PROOF OF SERVICE

The undersigned hereby certifies that on November 10, 2014, he served the foregoing **REPLY IN SUPPORT OF RESPONDENTS' MOTION TO STRIKE A PORTION OF APPELLANTS' REPLY BRIEF** on all counsel of record by placing a copy in the United States Mail, first class postage prepaid, addressed as follows:

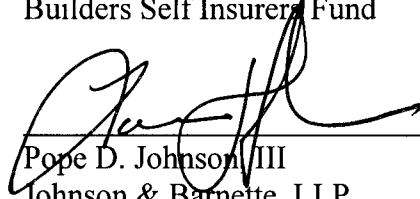
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November 10, 2014

Via Hand Delivery

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Clerk, Court of Appeals
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Columbia, SC 29211

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SC Court of Appeals

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

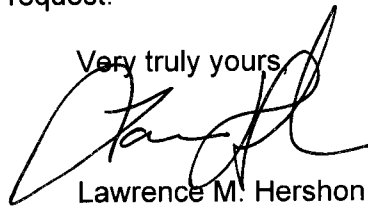
Dear Ms. Kitchings:

Enclosed please find the original and seven copies of the Reply in Support of Respondents' Motion to Strike a Portion of Appellants' Reply Brief and Proof of Service in the above-referenced case. Please return a file-stamped copy of the Reply and Proof of Service to my courier.

By copy of this letter, I am today serving the Reply 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
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William W. Wilkins, Esq. (w/enc.) – via U.S. Mail
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