

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

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

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,
Fontaine Business Park 15, LLC, Fontaine Business Park 16, LLC,
Fontaine Business Park 17, LLC, Fontaine Business Park 18, LLC,
Fontaine Business Park 19, LLC, Fontaine Business Park 20, LLC,
Fontaine Business Park 21, LLC, Fontaine Business Park 22, LLC,
Fontaine Business Park 23, LLC, Fontaine Business Park 24, LLC,
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,
and Fontaine Business Park 31, LLC,..... Appellants.

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SC Court of Appeals

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES

1. This Court must affirm because the trial court ruled on two independent and alternative grounds, and the appellants have failed to challenge one of those grounds, thereby making it the law of this case.
2. This Court must affirm because, even if the appellants have challenged both of the trial court's independent and alternative rulings, at least one of them is correct.
3. The trial court correctly ruled that the appellants waived any right to a jury trial pursuant to a valid jury trial waiver, and the appellants' contrary arguments have no merit. And to the extent necessary, as an additional sustaining ground under *I'On, LLC v. Town of Mt. Pleasant*, 526 S.E.2d 716, 723 (S.C. 2000), and as a reason to affirm under Rule 220(c), SCACR, the trial court ruled correctly because the cornerstone of every counterclaim is the appellants' claim that respondent breached the contract between them.
4. In the alternative, and as an additional sustaining ground under *I'On, LLC v. Town of Mt. Pleasant*, 526 S.E.2d 716, 723 (S.C. 2000), and as a reason to affirm under Rule 220(c), SCACR, the appellants' counterclaims are permissive and, therefore, they waived any right to a jury trial by asserting them in an equitable action.
5. The appellants' argument that the respondent should be estopped from enforcing the jury trial waiver is not preserved for appeal and has no merit.
6. The trial court correctly ruled that the appellants have no right to a jury trial under the Supreme Court's ruling in *Collier v. Green*, 137 S.E.2d 277 (S.C. 1964) and, moreover, the appellants have not challenged this ruling, thereby making it the law of the case under which this Court must affirm.
7. The trial court correctly referred the entire case to the master-in-equity, and the appellants' contrary arguments are not preserved for appeal.
8. The appellants have abandoned any claimed right to a jury trial on their affirmative defenses, and any such claim is barred by the law of the case doctrine, and any such claim has no merit.
10. The appellants have abandoned any claimed right to a jury trial on all but five of their counterclaims, and any such claim is barred by the law of the case doctrine, and any such claim has no merit.
11. The appellants have violated Rules 209(b) and 210(c), SCACR, by designating matters for inclusion in the Record on Appeal that were not presented to the trial court.

STATEMENT OF THE CASE

This is a commercial mortgage foreclosure case. The respondent (Plaintiff) is the mortgagee. The thirty-one appellants (Defendants) are the mortgagors. Plaintiff declared a default and brought this foreclosure action. Defendants answered and counterclaimed, demanding a jury trial. The fundamental question in this appeal is whether Defendants have a right to a jury trial and, if so, whether they waived that right in the loan documents.

Plaintiff moved to strike Defendants' jury trial demand. The trial court granted this motion on two independent and alternative grounds: (1) Defendants waived any jury trial right in the loan documents; and (2) Defendants had no jury trial right under *Collier v. Green*, 137 S.E.2d 277 (S.C. 1964). Defendants timely appealed.

STATEMENT OF FACTS

Appellant Fontaine Business Park financed the purchase of the mortgaged property under a loan agreement and mortgage with the original lender (Greenwich Capital).¹ As permitted by these loan documents,² Greenwich Capital transferred its interest to the Royal Bank of Scotland,³ which thereafter transferred its interest to Plaintiff.⁴ As also permitted by the loan documents,⁵ Fontaine sold tenancy-in-common (TIC) interests to the remaining thirty appellants (the TIC defendants).⁶ As required by the loan documents,⁷ each TIC defendant agreed to be bound by all terms of the loan documents.⁸

¹ Loan Agmt. at 1 and 17, § 2.1; Mortg. at 1.

² Loan Agmt. at 66, § 9.1.1 and 77, § 10.21; Mortg. at 13, § 21.

³ Cmplnt. at 18-20, ¶¶ 72-83 and Exhs. B, K, L and, M at R. ____.

⁴ Cmplnt. at 20-21, ¶¶ 84-94 and Exhs. B, N, O, and P at R. ____.

⁵ Loan Agmt. at 44-47, § 5.26.2

⁶ Loan Assump. at 1 and Exh. A; Amd. Loan Assump. at 1 and Exh. A.

⁷ Loan Agmt. at 47-49, § 5.26.3

⁸ Each TIC defendant assumed "all of [Fontaine's] obligations and agreements under [all loan documents] as if each [TIC defendant] were an original party to each [loan document] together with [Fontaine]." Each TIC defendant agreed that all "references to [Fontaine]" included it, and it had "personal knowledge of all terms and conditions" in the loan documents. (Loan Assump. at 2, §§ 1, 3; Amd. Loan Assump. at 2-3, §§ 1(A), 3).

As a result of these transactions, Plaintiff and all Defendants became parties to the loan agreement and the mortgage, which incorporated all terms of the loan agreement. (Mortg. at 1; 4, § 1). These loan documents therefore establish the pertinent terms of the parties' contract, which this brief refers to as the "Contract." This Contract provided:

1. Defendants were required to make monthly payments to three Reserve Accounts: the Capital Reserve, Rollover Reserve, and Taxes and Insurance Reserve Accounts. The accounts were created and funded for the purpose of maintaining the mortgage property, paying expenses associated with leasing the office space at the mortgaged property, and paying the taxes and insurance premiums for the mortgaged property. Plaintiff had the right to increase these payments if deemed necessary in its "reasonable judgment" or "reasonable discretion." (Loan Agmt. at 23-26, §§ 3.3 - 3.5(a)).
2. Defendants were required to appoint a property manager for the day-to-day operations of Fontaine Business Park. (Loan Agmt. at p. 32, § 4.20 and p. 41, § 5.12.1(a)). Plaintiff had the right to require termination of the property manager if there was a continuing Event of Default. (Loan Agmt. at p. 42, § 5.12.2; Mortg. at p. 10, § 10(h)). An "Event of Default" included the failure to pay any amount when due under the Contract. (Loan Agmt. at p. 63, § 8.1(a); see also *id.* at p. 3, defining "debt").
3. Defendants waived the right to offset any payment obligation imposed by the Contract. (Loan Agmt. at p. 75, § 10.15).
4. Upon default, Defendant had the right to apply for the appointment of a receiver, accelerate the debt, and bring a foreclosure action. (Loan Agmt. at 64, § 8.2.1; Mortg. at 7-8, §§ 10(a)(i), 10(a)(iii), 10(a)(viii)).

Defendants waived their right to a jury trial under the following jury trial waiver clause:

[DEFENDANTS AGREE] NOT TO ELECT A TRIAL BY JURY OF ANY ISSUE TRIABLE OF RIGHT BY JURY, AND WAIVE ANY RIGHT TO TRIAL BY JURY FULLY TO THE EXTENT THAT ANY SUCH RIGHT SHALL NOW OR HEREAFTER EXIST WITH REGARD TO [THE CONTRACT], OR ANY CLAIM, COUNTERCLAIM OR OTHER ACTION ARISING IN CONNECTION THEREWITH. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS GIVEN KNOWINGLY AND VOLUNTARILY BY [DEFENDANTS], AND IS INTENDED TO ENCOMPASS INDIVIDUALLY EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A TRIAL BY JURY WOULD OTHERWISE ACCRUE.

(Underlining added).⁹ The fundamental question in this appeal is whether Defendants' counterclaims "aris[e] in connection" with the Contract.. They do. (See Arg. I(A), *infra*).

In July 2011, Plaintiff gave notice that it was increasing the monthly payments for the Capital Reserve Account and the Rollover Reserve Account. Defendants made the increased payments for the next four months. In January 2012, Defendants stopped making the increased payments and began making payments in the original amounts.¹⁰

In April 2012, Plaintiff gave notice that it was increasing the monthly payments for the Tax and Insurance Reserve Account. Defendants made the increased payments in April, May, and June 2012. Defendants stopped making the increased payments in July 2012 and reduced the payments to an amount that they claimed was sufficient.¹¹

In July 2012, Plaintiff gave notice that the failure to make all increased payments for all Reserve Accounts within 10 days would be deemed an Event of Default under the Contract. Defendants failed to do so, and Plaintiff declared an Event of Default.¹²

Defendants did not make the debt service (principal and interest) payment for October 2012. Defendants contend that no payment was due, because the prior increased Reserve Account payments were improper and should be used to offset debt service payments. Plaintiff gave notice that the failure to make the October 2012 payment was an Event of Default and accelerated the entire debt under the Contract.¹³

⁹ The loan agreement and mortgage (the Contract) contained separate but virtually identical waiver clauses. The quote above reflects the pertinent common language used in both waiver clauses. (See Loan Agmt. at 74-75, § 10.8 (all-caps) and compare with Mortg. at 13, § 22 (boldfaced all-caps). The trial court held that the waiver was "conspicuous and unambiguous," and that Defendants "knowingly" agreed to it. (Judge Cooper's Order at 5-6). Defendants do not challenge this ruling on appeal. (Init. App. Br., *passim*).

¹⁰ Cmplnt. at 22, ¶¶ 99, 102-103; TIC Answ. at 12-14, ¶¶ 51, 54-55; Fontaine Answ. at 14-16, ¶¶ 69, 72-73.

¹¹ Cmplnt. at 22-23, ¶¶ 106-108; TIC Answ. at 15, ¶¶ 58-60; Fontaine Answ. at 16-17, ¶¶ 76-78.

¹² Cmplnt. at 23, ¶¶ 112-114; TIC Answ. at 17-18, ¶¶ 64-66; Fontaine Answ. at 18-19, ¶¶ 82-84.

¹³ Cmplnt. at 24, ¶¶ 115-118; TIC Answ. at 18-19, ¶¶ 67-70; Fontaine Answ. at 19-20, ¶¶ 85-88.

As there was a continuing default for failure to make the Reserve Account and debt service payments, Plaintiff demanded termination of Defendants' property manager (Fontaine Management) as provided in the Contract. Defendants refused this demand.¹⁴

Plaintiff commenced this foreclosure action and filed motions for a reference to the master and the appointment of a receiver. (Judge Lee Order at p. 5). The TIC defendants joined together to file a joint Answer and Counterclaim. (TIC Answ. at R. __ - __). Fontaine filed a separate Answer and Counterclaim. (Fontaine Answ. at R. ___ - ___).

The motions for reference and receiver came before Judge Allison Lee. (Judge Lee Order at p. 1). She granted the motion for receiver, holding that Defendants were in default for failure to make the October and November 2012 debt service payments, and rejecting their argument that they were entitled to an offset for the increased Reserve Account payments. (*Id.* at 1, 5-7).¹⁵ She declined to hear the motion for reference. (*Id.* at 2). Thereafter, Plaintiff moved to strike Defendants' jury trial demand, return the case to the non-jury docket, and refer the case to the master if the jury trial demand was stricken. (Motion at 1; 1/13/14 Hrg. Tr. at 22).

Judge Thomas Cooper granted the motion to strike Defendants' jury trial demand on two independent and alternative grounds: (1) Defendants waived any right to a jury trial under the jury trial waiver clause in the Contract; and (2) "[e]ven without the express jury trial waivers," Defendants were not entitled a jury trial under *Collier v. Green*, 137 S.E.2d 277 (S.C. 1964). (Judge Cooper's Order at pp. 2-8). Accordingly, he referred all issues to the master for a trial on the merits pursuant to Rules 53 and 71, SCRPC. (*Id.* at 9). Defendants did not file a motion to reconsider Judge Cooper's order before appealing.

¹⁴ Cmplnt. at 24, ¶¶ 120-122; TIC Answ. at 20-21, ¶¶ 72-74; Fontaine Answ. at 21-22, ¶¶ 90-92.

¹⁵ Defendants could have but did not appeal this order. See S.C. Code Ann. § 14-3-330(4) (Supp. 2013).

RESPONSE TO DEFENDANTS' STATEMENT OF FACTS

Throughout their Statement of Facts and elsewhere in their Brief of Appellants, Defendants cite and rely heavily on evidence purportedly supporting the merits of their counterclaims. (*E.g.*, Init. App. Br. 12-16 and 22-24). Much of this “evidence” is cited in violation of the appellate court rules.¹⁶ More importantly, the merits of Defendants’ counterclaims is not the question here. Rather, the question is who will decide the merits, a jury or a judge sitting without a jury. That question depends on the nature of and basis for Defendants’ counterclaims, not the evidence on the merits of those counterclaims.

ARGUMENT

The trial court held that Defendants did not have a right to a jury trial on their counterclaims on two independent and alternative grounds. This immediately triggers two fundamental rules of appellate review. First, Defendants’ failure to challenge the second ground (the *Collier* ruling) makes that ruling the law of the case and, therefore, this Court “must affirm.” *Ex parte Kent*, 666 S.E.2d 921, 925 (S.C. App. 2008) (appellate court “must affirm” under the law of the case doctrine if appellant does not challenge alternative ruling of the trial court). Second, if either of the alternative grounds is correct (and both are), this Court must affirm regardless of any error in the other ruling. *Anderson v. South Carolina Dep’t of Hwys. and Pub. Transp.*, 472 S.E.2d 253, 255 & n.1 (S.C. 1996).

¹⁶ The appellate court rules limit designations to materials that “may be properly included in the Record on Appeal,” which “shall not . . . include matter which was not presented to the lower court or tribunal.” Rules 209(b) and 210(c), SCACR. The only “matter” that Defendants presented to Judge Cooper were the exhibits to Fontaine’s memorandum in opposition to the motion to strike their jury trial demand. (Fontaine Opp. Memo., Exhs. A-C at R. ___-___). Defendants, however, cite and designate the following matter which was not included in those exhibits: (1) Liffman Depo., pp. 103-120, 155, 174 and Depo. Exhs. 3,6, 10; and (2) Matthews Depo. Exhs. 1, 3, 6. (See Init. App. Br. 13, 15, 16; see also App. Designation filed with Init. App. Br. at Items 19-20, designating deposition transcripts and exhibits “that are referred to in the Initial Brief of Appellants on pages” 13, 15, and 16). In any event, as noted in the text appended to this footnote, these designations are evidence on the “merits” of Defendants’ counterclaims, which is not the issue here, but Plaintiff objects to these violations of the SCACR to the extent necessary.

I. Defendants are not entitled to a jury trial on their counterclaims.

Defendants are not entitled to a jury trial on their counterclaims, because they waived any such right in the Contract or their counterclaims are permissive. And, as shown in Argument II, *infra*, Defendants never had a right to a jury trial on their counterclaims.

A. Defendants' counterclaims arise in connection with the Contract and, therefore, they waived any right to a jury trial.

Fontaine and the TIC defendants made numerous counterclaims but, on appeal, they argue a jury trial right for only five of those counterclaims.¹⁷ Defendants make general claims applicable to all counterclaims and then make specific counterclaims. The cornerstone for every counterclaim is Defendants' claim that Plaintiff breached the

¹⁷ Defendants argue that they are entitled to a jury trial on the following counterclaims: (1) breach of fiduciary duty; (2) economic duress; (3) interference with contractual and business relations; (4) interference with contract; and (5) South Carolina Unfair Trade Practices Act (SCUTPA). (Init. App. Br. at 6, 16, 18, 19). They never argue that they are entitled to a jury trial on any affirmative defenses or any of their other counterclaims. (Init. App. Br., *passim*). Thus, Defendants have abandoned any claim to a jury trial on these matters. *Biales v. Young*, 432 S.E.2d 482, 484 (S.C. App. 1993). Moreover, Defendants have not challenged the trial court's ruling that they waived any right to a jury trial on their affirmative defenses or their other counterclaims. (Judge Cooper's Order at p. 5). Thus, the trial court's ruling is the law of this case. *Ex parte Kent*, 666 S.E.2d 921, 925 (S.C. App. 2008). Any attempt to make any such arguments in their Reply Brief would be meaningless, because it is axiomatic that arguments for reversal cannot be made for the first time in a reply brief. *McClurg v. Deaton*, 716 S.E.2d 887, 888 n.2 (S.C. 2011); *Bochette v. Bochette*, 386 S.E.2d 475, 477 (S.C. App. 1989). In any event, all of these affirmative defenses and other counterclaims hinge upon the linchpin claim that Plaintiff breached the Contract. (Fontaine Answ. at 24-,27 ¶¶ 104-114; 33-35, ¶¶ 173-177; 36-37, ¶¶ 181-183; 38-39, ¶¶ 196-203; TIC Answ. at 24-27, ¶¶ 86-96; 34-36, ¶¶ 155-159; 38-39, ¶¶ 163-170). Thus, as with the challenged counterclaims, Defendants waived any right to a jury trial.

In their brief, Defendants make a passing reference to Fontaine's "Suppl. Counterclaim" (Init. App. Br. 8), wherein Fontaine (but not the TIC defendants) added a counterclaim for conversion and supplemented its "interference" counterclaims. (Fontaine's Suppl. Pldg. at R. ___ - ___). No issue regarding these supplemental counterclaims is properly before this Court because: (1) conclusory statements are insufficient to present any issue for appellate review, *Brouwer v. Sisters of Charity Providence Hosps.*, 763 S.E.2d 200, 203 n.4 (S.C. 2014); and (2) Fontaine never raised any "supplemental counterclaim" issue to the trial court, *Pye v. Estate of Fox*, 333 S.E.2d 505, 510 (S.C. 2006) (issue cannot be raised for first time on appeal). In any event, Fontaine's supplemental counterclaim arises in connection with the Contract and, therefore, Fontaine waived any right to a jury trial on it. Fontaine claims that Plaintiff wrongly took possession of the Reserve Accounts after declaring Defendants in default, because Plaintiff wrongly increased the Reserve Accounts and thereby wrongly created an event of default. (Fontaine Suppl. Pldg. at R. ___ - ___, *passim*). Thus, Fontaine's supplemental counterclaims, like all of Defendants' counterclaims, hinge upon the claim that Plaintiff breached the Contract and, therefore, the supplemental counterclaims arise in connection with the Contract, and Fontaine waived any right to a jury trial. Moreover, the Contract expressly granted Plaintiff the right to take possession of the Reserve Accounts upon an event of default. (Loan Agmt. at 26-27, § 3.11). Thus, Fontaine's supplemental counterclaims are nothing more than yet another claim that Plaintiff breached the Contract and, therefore, Fontaine waived any right to a jury trial on these supplemental counterclaims.

Contract by violating the contractual standards for increasing the Reserve Account payments. Thus, every counterclaim arises in connection with the Contract and, therefore, Defendants waived any right to a jury trial on every counterclaim.

The General Claims: Defendants' general claims apply to all counterclaims, and Defendants therein claim that Plaintiff breached the Contract in the following manner:

1. The Contract grants Plaintiff the right to increase the monthly contributions to the three Reserve Accounts,¹⁸ but Plaintiff unreasonably increased those contributions without proper justification in violation of the Contract.¹⁹
2. "As required by the [Contract]," Defendants asked Plaintiff to justify and substantiate the Reserve Account increases, but Plaintiff ignored the request.²⁰ "Notwithstanding the provisions of the [Contract]," and multiple requests from Defendant, Plaintiff did not account for the funds paid by Defendants, did not provide any substantiation for the Reserve Account increases, and did not reassess the Reserve Accounts.²¹
3. The Reserve Account increases were arbitrary, capricious, exorbitant, unreasonable, unconscionable, invalid, void and unenforceable.²²
4. As a result of the Reserve Account increases, Plaintiff now possesses funds exceeding "any and all amounts due under the [Contract]." Defendants are entitled to a refund of the "erroneous and improper" Reserve Account increases or, in the alternative, to have the excess credited to the future amounts due under the Contract.²³
5. Plaintiff has demanded termination of Defendant's property manager by relying on defaults that "were fabricated by [Plaintiff] through manipulation of the reassessment process" for the Reserve Accounts.²⁴

In short, every counterclaim turns upon the linchpin claim that Plaintiff breached the Contract. Defendants' specific counterclaims also turn upon this same linchpin.

¹⁸ Fontaine Answ. at 27-29, ¶¶ 118-134; TIC Answ. at 28-30, ¶¶ 100-116.

¹⁹ *Id.*; Fontaine Answer at 30-31, ¶¶ 142-145, 149-155; TIC Answ. at 31-32, ¶¶ 124-127, 131-137.

²⁰ Fontaine Answ. at 31, ¶ 156; TIC Answ. at 32, ¶ 138.

²¹ Fontaine Answ. at 32-33, ¶¶ 166-169; TIC Answ. at 33-34, ¶¶ 148-151.

²² Fontaine Answ. at 32, ¶¶ 158-160; TIC Answ. at 33, ¶¶ 140-142.

²³ Fontaine Answ. at 32, ¶¶ 161-162; TIC Answ. at 33, ¶¶ 143-144.

²⁴ Fontaine Answ. at 32, ¶¶ 163-165; TIC Answ. at 33, ¶¶ 145-147.

Breach of Fiduciary Duty: Defendants claim that the “[Contract] created a confidential and fiduciary relationship between” Plaintiff and Defendants, and that Plaintiff “violated its fiduciary duty to [Defendants]” by “[a]rbitrarily and capriciously” increasing the monthly Reserve Accounts payments. (Fontaine Answ. at 35, ¶ 179(a-c); TIC Answ. at 36-37, ¶ 161(a-c)). Defendants also claim that Plaintiff prevented their performance under the Contract and made it impossible for them to perform by “[a]rbitrarily and capriciously” increasing the Reserve Accounts payments. (Fontaine Answ. at 35-36, ¶ 179(d-e); TIC Answ. at 37, ¶ 161(d-e)). They recast as breaches of fiduciary duty their prior general claims that Plaintiff breached the Contract by refusing to justify and substantiate the Reserve Account increases, and by refusing to refund excess Reserve Account payments or credit them to future debt service. (Fontaine Answ. at 36, ¶ 179(f-h); TIC Answ. at 37-38, ¶ 161(f-h)). Finally, Defendants claim that Plaintiff “manufacture[d] an Event of Default” by “[m]anipulating the process of reassessment of Reserve Accounts” and thereby declared Defendants in default “when no Event of Default [under the Contract] has occurred.” (Fontaine Answ. at 36, ¶ 179(i-j); TIC Answ. at 38, ¶ 161(i-j)).

Tortious Interference with Contractual Relations: The Contract granted Plaintiff the right to demand termination of Defendants’ property manager upon a continuing Event of Default. (Loan Agmt. at 42, § 5.12.2; Mortg. at 10, § 10(h)). An “Event of Default” included the failure to pay any amount due under the Contract. (Loan Agmt. at 63, § 8.1(a); see also *id.* at 3, defining “debt”). In claiming tortious interference, Fontaine merely recasts its prior general claims that Plaintiff wrongly demanded termination of the property manager. (Fontaine Answ. at 37, ¶¶ 184-185). Fontaine claims this demand was made

without justification by “[manipulating the Reserve Account] reassessment process” and the resulting improper “invocation of the default remedies.” (Fontaine Answ. at 37, ¶ 185).

Tortious Interference with Business or Prospective Contractual Relations: Fontaine recasts its claim for interference with contractual relations as a claim for interference with business or prospective contractual relations. Specifically, Fontaine again claims that Plaintiff interfered with the business relationship between Fontaine and its property manager through “manipulation of the [Reserve Account] reassessment process,” thereby invoking “the default remedies” in the Contract. (Fontaine Answ. at 37, ¶ 188).

Tort of Economic Duress: Fontaine claims that it “has been harmed by the unlawful actions of [Plaintiff], *as described above.*” (Fontaine Answ. at 38, ¶ 191) (emphasis added). These “above-described actions” are the previously discussed claims that Plaintiff has breached the Contract, including the linchpin claim that Plaintiff wrongly exercised its contractual right to increase the Reserve Account payments.

South Carolina Unfair Trade Practices Act (SCUTPA): The TIC defendants make a SCUTPA claim based on “Plaintiff’s *actions described hereinabove.*” (TIC Answ. at 40, ¶ 174) (emphasis added). These “above-described actions” are the previously discussed claims that Plaintiff breached the Contract, and the linchpin claim that Plaintiff wrongly exercised its contractual right to increase the Reserve Account payments.

Summary & Conclusion: The cornerstone for every counterclaim is the claim that Plaintiff breached the Contract. Thus, every counterclaim arises in connection with the Contract. Therefore, Defendants waived any right to a jury trial on every counterclaim.²⁵

²⁵ The TIC defendants make no “interference” or “economic duress” counterclaims; and Fontaine makes no SCUTPA counterclaim. (TIC Answ. and Fontaine Answ. at R. __-__ and __-__, *passim*).

B. Defendants' appellate arguments that they have not waived their right to a jury trial have no merit.

In the opening sections of their brief, Defendants continue to rely, as they must, on the linchpin claim that Plaintiff breached the Contract:

1. Plaintiff unnecessarily and unreasonably increased the monthly payments to the Reserve Accounts. (Init. App. Br. at 7, 10).
2. Plaintiff refused to offset Defendants' debt service payments with the excess Reserve Account funds that resulted from the wrongful increase in the Reserve Account payments. (*Id.* at 8, 10).
3. The Contract granted Plaintiff the right to increase the payments into the Reserve Accounts in Plaintiff's "reasonable discretion" and "reasonable judgment," but Plaintiff unreasonably exercised this contractual right to wrongly increase these monthly payments. (*Id.* at 11-14).
4. Plaintiff based the increased Reserve Account payments on a budget that it requested from the on-site property manager (CBRE) without first providing notice to Defendants "as required under the Notice provisions of the Loan Agreement." (*Id.* at 14).
5. Despite requests from Defendants, Plaintiff refused to justify its Reserve Account increases and refused to reassess the Reserve Accounts, *i.e.*, refused to lower the Reserve Account payments. (*Id.* at 15-16). In their counterclaims, Defendants based these claimed rights to justification and reassessment on the Contract.

For the remainder of their brief, Defendants speak in generalities without focusing on their specific counterclaims. The reason for this is simple. Any focus on their counterclaims, as demonstrated in Argument I(A), *supra*, shows that the counterclaims hinge upon claims that Plaintiff breached the Contract. Thus, the counterclaims arise in connection with the Contract and, therefore, Defendants waived any right to a jury trial.

Defendants' first argument is that "[l]egal counterclaims in an equitable action may require a jury trial." (Init. App. Br. 16-17, Arg. I(A)) (emphasis added). This is true, but it is not the question here. Rather, the question is whether Defendants actually have a right

to a jury trial and, if so, whether they waived that right. Defendants also argue that jury trial waiver clauses are strictly construed, and a waiver generally will not be implied. (Init. App. Br. 17). Again, this is true, but it is not the question here. This case involves the application of an express jury waiver clause, and the rule of strictly construing such clauses cannot be used to avoid the plain meaning of the language used in the jury waiver clause. *Beach Co. v. Twillman, Ltd.*, 566 S.E.2d 863, 866 (S.C. App. 2002).

Defendants' second argument is that they "are entitled to a jury trial on their legal counterclaims that were not waived beforehand in the [Contract]." (Init. App. Br. 18-20, Arg. I(B)). They argue that their counterclaims present questions that are "quintessentially jury issues." (*Id.* at 18). Assuming this is true, that is not the question here. The question is whether Defendants waived any right to a jury trial, even if they might otherwise be entitled to a jury trial, which they are not under the ruling in *Collier*. (See Arg. II, *infra*).

Defendants also argue that waiver clauses must be "strictly construed," and nothing in the waiver clause "can be construed as waiving all legal claims arising between the parties" or "construed as waiving [their] counterclaims," as opposed to any jury trial right on those claims. (Init. App. Br. at 19-20). This is true but not the question here. Plaintiff never argued and the trial court never ruled that Defendants waived their claims. The question is whether Defendants had a jury trial right and, if so, whether they waived it.

Defendants correctly quote the jury trial waiver clauses as part of their second argument (Init. App. Br. 18-19) but then attempt to limit them by misquoting them:

Thus, by their own plain terms, these waivers apply only to disputes concerning the terms of the "Loan Agreement," the "Mortgage," "any other Loan Documents," and any claim, counterclaim, or other action *in connection therewith*."

[Defendants' counterclaims] do not exist "with regard to the Loan Agreement," "the Mortgage," or "any other Loan Document." Nor are they connected "therewith."

(Init. App. Br. at 19) (all emphasis added) (footnote omitted). The above italicized language, which Defendants present as a quotation from the waiver clauses, omits the word "arising," *i.e.*, the waiver clauses actually state that the waiver applies to any counterclaim "*arising* in connection" with the Contract. (See Loan Agmt. at pp. 74-75, § 10.8; Mortg. at p. 13, § 22) (emphasis added). This is a broader concept than simply being "in connection therewith" or "connected 'therewith.'" In any event, as shown in Argument I(A), *supra*, Defendant's counterclaims are "connected" with the Contract, because every counterclaim rests upon claims that Plaintiff breached the Contract.

Defendants' third argument is that Plaintiff has not shown that Defendants' counterclaims, "which exist independently of the contractual relationship between the parties, are encompassed by the limited jury trial waivers." (Init. App. Br. 21). Simply reading Defendants' counterclaims, as demonstrated in Argument I(A), *supra*, shows that Defendants' counterclaims are "encompassed" by the waiver clause and do not "exist independently of the contractual relationship between the parties." (See 1/13/14 Hrg. Tr. at 8-10, 24-26). The cornerstone of every counterclaim is the claim that Plaintiff breached the Contract and, therefore, the counterclaims arise in connection with the Contract.²⁶

Defendants' fourth argument is that "[e]ven if the contractual jury waivers are otherwise applicable, [Plaintiff] should be equitably estopped from enforcing them because of its outrageous conduct." (Init. App. Br. 21-25). This argument is not preserved for

²⁶ Defendants cite the Supreme Court's opinion in *Wachovia Bank Nat'l Ass'n v. Blackburn*, 755 S.E.2d 437 (S.C. 2014) in support of their second and third argument. (Init. App. Br. 20, 22). These arguments are addressed in Argument I(C), *infra*.

appeal. Defendants never made this argument to the trial court, and it is axiomatic that an appellant cannot raise an issue for the first time on appeal. *Pye v. Estate of Fox*, 633 S.E.2d 505, 510 (S.C. 2006). Moreover, the trial court did not rule on any estoppel issue (Judge Cooper's Order, *passim*), and Defendants did not file a post-order motion to obtain a ruling. Thus, the issue is not preserved for appeal, because it is axiomatic that an issue not ruled upon specifically by the trial court cannot be considered on appeal unless the appellant filed a motion to obtain a ruling from the trial court. *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 755 S.E.2d 437, 440 n.6 (S.C. 2014), *rev'g and aff'g in part* 716 S.E.2d 454 (S.C. App. 2011) (argument that jury trial waivers were "unconscionable" and should therefore not be enforced was not preserved for appeal, because circuit court did not rule on it and appellants did not file a motion to reconsider before appealing the order). In any event, Defendants' "estoppel" argument has no merit.

Defendants never argue any misconduct by Plaintiff in obtaining the jury trial waiver. Moreover, Defendants never challenge the trial court's ruling that the jury trial waiver in the Contract was "conspicuous and unambiguous" or that Defendant's assent to the waiver was "knowing and voluntary." (Judge Cooper's Order at 5-6). Thus, these rulings are the law of this case. *Ex parte Kent*, 666 S.E.2d 921, 925 (S.C. App. 2008); *accord Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970).

Defendants argue that Plaintiff is estopped from enforcing the waiver, because Plaintiff breached the Contract. This is nonsensical. Defendants' linchpin claim that Plaintiff breached the Contract is the trigger for applying the waiver. If one were to accept Defendants' argument, no jury waiver clause would ever be enforceable. A waiver clause is irrelevant until claims within its scope are made. Defendants' claim that Plaintiff's

breach of contract was “arbitrary, capricious, outrageous, and unconscionable” and “commercially unreasonable” does not change this. (Init. App. Br. 24).

Finally, Defendants have failed to claim the essential elements of estoppel, which are a representation, reliance on that representation, and a resulting prejudicial change in position. *State Accident Fund v South Carolina Second Injury Fund*, 693 S.E.2d 441, 446 (S.C. App. 2010). Defendants never claim any representation by Plaintiff upon which they relied to change their position to their prejudice. Thus, they have failed to claim estoppel.²⁷

C. The Supreme Court’s ruling in *Wachovia Bank, Nat’l Ass’n v. Blackburn*, 755 S.E.2d 437 (S.C. 2014), rev’g and aff’g in part 716 S.E.2d 454 (S.C. App. 2011) demonstrates that Defendants are not entitled to a jury trial, because their counterclaims are either permissive or covered by the jury trial waiver clause.

Defendants’ principal argument to Judge Cooper was: (1) Plaintiff’s conduct in increasing the Reserve Account payments was so outrageous that it was not foreseeable at the time of entering into the Contract; and (2) therefore, there was no meeting of the minds that the jury trial waiver clause would apply to this conduct. To support this argument, Defendants relied exclusively on this Court’s opinion in *Blackburn*, 716 S.E.2d 454. (1/13/14 Hrg. Tr. at 11-12, 17-20; Fontaine Memo. in Opp. at 5-6).²⁸

Before Defendants filed their Initial Brief of Appellant, the Supreme Court reversed this Court’s opinion in *Blackburn* on this point. 755 S.E.2d at 441-443.²⁹ Defendants cite

²⁷ Defendants cite this Court’s opinion in *Pearson v. Hilton Head Hosp.*, 733 S.E.2d 597 (S.C. App. 2012). (Init. App. Br. 24). There, the defendant argued that his claim was not subject to a contractual arbitration clause, because he was not a signatory to the contract. This Court disagreed, finding that the defendant’s prior assertions that he was a party to the contract and entitled to the rights and benefits afforded by that contract estopped him from denying that he was a party to the arbitration clause in the same contract. *Id.* at 601-602. There is no such conduct in this case, and Defendants claim none.

²⁸ Defendants relied on *Partain and Aiken, infra*, but only to the extent that this Court did so in *Blackburn*.

²⁹ The Supreme Court issued its *Blackburn* opinion on February 26, 2013. Defendants filed their Notice of Appeal on February 27, 2013. (R. ____). The Supreme Court denied rehearing in *Blackburn* on April 2, 2013. Defendants filed their Initial Brief of Appellant on August 1, 2014. On appeal, Defendants have not made

and attempt to rely on the Supreme Court’s decision, but they never acknowledge that the Supreme Court reversed this Court and rejected their principal argument to Judge Cooper. And not surprisingly, they never discuss the Supreme Court’s principal ruling in *Blackburn*, because that ruling requires an affirmance of the appealed order.

1. The *Blackburn* Case.

The appeal in *Blackburn* arose under the identical procedural posture as the present appeal. The plaintiff (bank) held the note and mortgage on the property of the defendants (debtors). The note contained the following jury trial waiver clause:

[The debtors waive any right] to a trial by jury in respect of any litigation based on, or arising out of, under or in connection with [the loan documents] or any agreement contemplated to be executed in connection with this note, or any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party with respect thereto.

755 S.E.2d at 439 (emphasis by court, all-caps omitted). The bank declared a default and brought a foreclosure action. The debtors answered and counterclaimed, demanding a jury trial on their counterclaims, which were based on the following claims:

1. The seller of the debtors’ property held a sales event to generate sales of lots in a to-be-built housing development. The bank and two realtors attended the event at the seller’s request and set up booths to promote financing the lot sales. 755 S.E.2d at 439.
2. The bank, as well as the seller and realtors, promised buyers that amenities in the housing development would be complete within 18 months. They also made “artificially inflated” representations about the value of the property. All of this induced the debtors to buy the property. The actions of the seller and realtor were imputed to the bank, such that the bank was legally responsible for their actions. 755 S.E.2d at 439, 440.
3. Over six months later, the debtors financed the purchase through a note, mortgage, and personal guaranties with the bank. The note and guaranties contained virtually identical jury trial waivers. 755 S.E.2d at 439.

and thereby abandoned the “*Blackburn*” argument that they made to the trial court, nor have they challenged the trial court’s rejection of their “*Blackburn*” argument. (Judge Cooper’s Order at 7-8).

The gravamen of the debtors' counterclaims were the alleged misrepresentations during the "sales transaction" (numbers 1 and 2 above). This conduct occurred long before the debtor entered the contract with the bank in the "loan transaction" (number 3 above). The debtors argued that the jury waiver did not apply to their counterclaims, because it "applied only to torts committed during the loan transactions, but not to those committed during the sales transaction." 755 S.E.2d at 440, 442. The trial court granted the banks' motion to strike the jury trial demand and referred the entire case to the master. The debtors appealed.

The debtors argued that the bank's conduct was so outrageous that it was not foreseeable at the time the parties entered the jury waiver agreement and, therefore, there was no meeting of the minds that the waiver would apply to this conduct. In making this argument, the debtors relied heavily on two arbitration cases: *Partain v. Upstate Automotive Group*, 689 S.E.2d 602 (S.C. 2010) and *Aiken v. World Finance Corp. of S.C.*, 644 S.E.2d 705 (S.C. 2007). This Court accepted this argument and others, holding that the waiver clause did not apply to the debtors' "sales transaction" counterclaims.

First, this Court held that the "sales transaction" was completely separate from the "loan transaction" and, applying a strict construction of the waiver clause, the debtors could not have contemplated at the time of entering the waiver agreement that it would apply to fraudulent conduct that occurred long before entering it. 716 S.E.2d at 460. In short, this Court held that the waiver clause, including its "course of conduct" and "course of dealings" language, did not allow the waiver to reach back in time and capture conduct that occurred before the execution of the waiver agreement. The Supreme Court reversed.

The Supreme Court opened its analysis by recognizing a need to modify the traditional analysis for deciding whether a party was entitled to a jury trial on counterclaims

asserted in an equitable action so as to include the impact of a jury trial waiver clause. 755 S.E.2d at 441. Accordingly, the Supreme Court set forth the following modified analysis:

1. If the complaint and counterclaim are equitable, the entire case is to be tried without a jury.
2. If the complaint and counterclaim are both legal, the entire case is to be tried by a jury.
3. If the complaint is equitable and the counterclaim is legal and permissive, the counterclaiming defendant waived any right to a jury trial.
4. If the complaint is equitable and the counterclaim is legal and compulsory, there is a right to a jury trial on the counterclaim unless a valid jury trial waiver encompasses the counterclaim.

755 S.E.2d at 441-442. Turning to the debtors' counterclaims, the Supreme Court held that the debtors were not entitled a jury trial under the following analysis:

1. If, as the debtors argue, the sales transaction was separate from the loan transaction, "then by definition the counterclaims would be permissive." The Court continued: "[The bank's] action is a foreclosure action centered entirely on obligations created by the loan documents. If the sale were separate from the loan, then the counterclaims involving the sale" were not compulsory and, therefore, the debtors waived any right to a jury trial by asserting the counterclaims in an equitable action.
2. On the other hand, if the debtors' counterclaims were compulsory as they argue, this would be true only if the "course of conduct" and "course of dealing" language in the waiver clause made the sales and loan transactions one continuous transaction or occurrence. Thusly viewed, the jury trial waivers "necessarily apply" because "the sales transaction falls squarely within the coverage of the waiver provisions" by virtue of the "course of conduct" and "course of dealing" language in the waiver clause.

755 S.E.2d at 442-443. In short, the Supreme Court held that the debtors' counterclaims had to be permissive or compulsory. To be compulsory, the waiver clause had to reach back in time and capture the conduct in the sales transaction, thereby making that conduct subject to the jury trial waiver. Thus, whether permissive or compulsory, the debtors'

waived their right to a jury trial on their counterclaims. The same analysis applies here and leads to the same result – Defendants waived any jury trial right on their counterclaims.

2. The Supreme Court’s ruling in *Blackburn* forecloses Defendants’ appellate arguments and compels the conclusion that Defendants’ have no right to a jury trial on their counterclaims.

Defendants never address the Supreme Court’s “permissive v. compulsory” analysis in *Blackburn*. This is not surprising, because applying that analysis yields the inescapable conclusion that they are not entitled to a jury trial on their counterclaims.

Quoting the Supreme Court’s *Blackburn* decision, Defendants summarily assert that their counterclaims are “legal and compulsory,” an obvious attempt to avoid the question of whether their counterclaims are permissive. (Init. App. Br. 17). For a counterclaim to be compulsory in a foreclosure action, a defendant must show that “prevailing on his counterclaim would affect the [lender’s] right to enforce the note and foreclose the mortgage,” thereby establishing a “logical relationship” between the counterclaim and foreclosure claim that makes the counterclaim compulsory. *Blackburn*, 755 S.E.2d at 442 n.7. Defendants attempt to make this showing in the following argument:

[Defendants’] counterclaims relate to [Plaintiff’s] *conduct and dealing* with [Defendants] under rights and obligations that *arise independently of the contractual agreements* between the parties. . . . All of these counterclaims may be litigated and decided *without reference to the terms* of [those contractual agreements]; **yet** they have such a logical relationship to the Loan that [Defendants’] *success would prevent [Plaintiff] from foreclosing on the Mortgage*.

(Init. App. Br. 19) (all emphasis added). This is the heart of Defendants’ appeal, and it is a classic example of proving too much.

If Defendants’ counterclaims can be decided “without reference to the [Contract],” then success could not affect Plaintiff’s right to foreclose the mortgage. Defendants would

receive a money damages award for a successful counterclaim, but this would not and could not affect Plaintiff's right to foreclose on the mortgage. Thus, as in *Blackburn*, Defendants' counterclaims would be permissive, and Defendants waived any jury trial right by asserting them in this equitable foreclosure action. If success on Defendants' counterclaim "would prevent [Plaintiff] from foreclosing on the Mortgage," then the counterclaim cannot be decided without reference to the Contract. Thus, as also in *Blackburn*, Defendants' counterclaims necessarily arise in connection with the Contract, and the jury waiver clause therefore applies, because "[Plaintiff's] action is a foreclosure action centered entirely on obligations created by the loan documents [the Contract]." 755 S.E.2d at 442.

3. Defendants' attempt to distinguish the waiver clause in *Blackburn* from the waiver clause at issue here rests upon a misunderstanding of the Supreme Court's analysis in *Blackburn*.

In *Blackburn*, the jury waiver clause was similar to the waiver at issue here, but it contained additional language (emphasized below):

[The debtors waive any right] to a trial by jury in respect of any litigation based on, or arising out of, under or in connection with [the loan documents] or any agreement contemplated to be executed in connection with this note, or *any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party with respect thereto.*

755 S.E.2d at 439 (emphasis by court). Defendants argue that the absence of any "course of conduct" language in the Contract's waiver yields a different result than in *Blackburn*:

The jury waiver [in *Blackburn*] goes beyond the related [loan documents] and includes, more broadly, "any course of conduct, course of dealing . . . or any actions of any party with respect thereto." Relying on that language, the Supreme Court concluded that the sales transaction that preceded the loan was included in the loan's jury waiver provision. [The waiver clauses at issue here] do not make any reference to the course of conduct or course of dealing between the parties, nor do they refer to "any actions of any party" with respect to the course of conduct and course of dealing. Accordingly, the jury waivers here must be construed strictly to claims for breach of the related written contracts [i.e., the Contract].

(Init. App. Br. 20)(emphasis added). Defendants misunderstand the Supreme Court’s ruling in *Blackburn*.

The *Blackburn* debtors argued that their counterclaims were compulsory so as to avoid any waiver based on their counterclaims being permissive, *i.e.*, that there was a “logical relationship” between their counterclaims and the bank’s foreclosure claim. The Supreme Court reasoned that this could be true only if the “course of conduct [etc.]” language in the waiver clause allowed the waiver to reach back in time and capture the pre-waiver conduct in the sales transaction, so as to make it and the loan transaction one continuous transaction. Doing so, however, brought the sales transaction conduct within the express terms of the waiver. 755 S.E.2d at 443. Here, there is no pre-contract conduct. All conduct upon which Defendants’ base their counterclaims took place after the Contract and was connected directly to the Contract. (See Arg. I(A), *supra*).

Moreover, Defendants’ conclusion is not supported by the Supreme Court’s *Blackburn* decision. They argue that, because the waiver at issue here does not include any “course of conduct [etc.]” language, it “must be construed strictly as limited to claims for breach of the related written contracts [*i.e.*, the Contract].” (Init. App. Br. at 20). The waiver at issue here, however, specifically included counterclaims “arising in connection” with the Contract. As demonstrated in Argument I(A), *supra*, every counterclaim hinges on the claim that Plaintiff breached the Contract, particularly by increasing the Reserve Account payments. Thus, Defendants’ counterclaims manifestly arise in connection with the Contract and, therefore, Defendants waived any right to a jury trial on those counterclaims. Strict construction cannot be used to alter the plain meaning of the waiver

clause that it applies to counterclaims “arising in connection” with the Contract. *Beach Co. v. Twillman, Ltd.*, 566 S.E.2d 863, 866 (S.C. App. 2002).

4. Defendants’ “outside the contract” arguments have no merit.

At the hearing before Judge Cooper, Defendants argued that “[t]he *entire theory of our counterclaims* are (sic) that [Plaintiff] *acted outside of the contract.*” (1/13/14 Hrg. Tr. at 20) (all emphasis added).³⁰ Defendants continue to make this “outside the contract” argument on appeal, but recast it as “non-contractual”:

“[T]he jury waivers do not apply to [Defendants’] *non-contractual* counterclaims.” (Init. App. Br. 16) (emphasis added). [Defendants’ counterclaims] “*arise independently of the contractual agreements between the parties.*” (*Id.* at 19) (emphasis added). [The waiver clauses] “do not apply to counterclaims that arise *independently of the parties contractual relationship.*” (*Id.* at 21) (emphasis added).

Defendants’ argument fails for three reasons. First, as demonstrated in Argument I(A), *supra*, the linchpin for every counterclaim is the claim that Plaintiff breached the Contract, particularly in increasing the Reserve Account payments. Thus, the counterclaims arise in connection with the Contract and, therefore, the waiver applies to every counterclaim.

Second, as demonstrated in this Argument I(C), *supra*, Defendants’ “outside the contract” argument fails under the Supreme Court’s ruling in *Blackburn, supra*. If Defendants’ counterclaims are “outside the contract,” then they are permissive and Defendants waived any jury trial right by making them in this equitable foreclosure action.

Finally, Defendants’ “outside the contract” argument is nonsensical. By definition, every breach of contract is “outside the contract,” *i.e.*, something that violates the contract. Here, Defendants do not and cannot dispute that the Contract granted Plaintiff the right to

³⁰ See also 1/13/14 Hrg. Tr. at 19 (Plaintiff’s actions “were *outside of the contract,*” and Plaintiff “did not have any authority under the contract to do what [it] did.”) (emphasis added).

increase the Reserve Account payments. They claim that Plaintiff's conduct was "outside the contract," because Plaintiff did not adhere to the standards imposed by the Contract. This is nothing more than a classic "breach of contract" claim, and the word game of calling it "outside the contract" or "non-contractual" does not change this. Thus, the counterclaims arise in connection with the Contract and, therefore, Defendants waived any jury trial right.

D. Summary and Conclusion

Defendants waived any right to a jury trial for any counterclaim "arising in connection" with the Contract. The linchpin for all of Defendants' counterclaims is that Plaintiff breached the Contract, particularly the contractual provisions allowing Plaintiff to increase the Reserve Account payments. Thus, Defendants' counterclaims manifestly arise in connection with the Contract and, therefore, Defendants waived any right to a jury trial on those counterclaims. Moreover, if Defendants' "outside the contract" argument is correct, then their counterclaims are permissive, and they waived any right to a jury trial by making them in this equitable foreclosure action under the Supreme Court's ruling in *Blackburn, supra*. For these reasons, and for all other reasons set forth in Argument I, *supra*, this Court should affirm the trial court, which moots all remaining issues.

II. Defendants are not entitled to a jury trial on their counterclaims under the Supreme Court's ruling in *Collier v. Green*, 137 S.E.2d 277 (S.C. 1964), and they have not appealed the trial court's ruling on this basis, thereby making that ruling the law of this case.

A trial court's unchallenged ruling is the law of the case and, right or wrong, requires affirmance. *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970). Defendants have not challenged the trial court's ruling that they have no right to a jury trial under *Collier v. Green*, 137 S.E.2d 277 (S.C. 1964). Thus, this Court "must affirm." *Ex parte Kent*, 666 S.E.2d 921, 925 (S.C. App. 2008) (appellate court "must affirm" under the

law of the case doctrine if appellant does not challenge alternative ruling of the trial court).

In any event, as also shown below, the trial court's rulings were correct.

Relying on *Collier* and the cases cited therein, the trial court held that Defendants were not entitled to a jury trial, even without the express jury trial waivers:

1. In *Collier*, the Supreme Court held that defenses and counterclaims affecting the validity of the lien and the amount due upon the debt are to be tried by the court on its equity side. (Judge Cooper's Order at 6).
2. Here, Defendants' "defenses and counterclaims essentially allege that Plaintiff 'created' an event of default and the foreclosure is, therefore, invalid. Pursuant to the holding in *Collier v. Green* and the cases discussed therein, such claims and defenses do not change the equitable nature of the foreclosure action." (*Id.* at 7).
3. "Defendants allege that [Plaintiff] essentially created an event of default by increasing the reserves [Reserve Accounts] unreasonably in violation of the terms of the Loan Agreement [the Contract]. Defendants' counterclaims clearly arise out of the loan documents and simply relate to whether there has been a default under the loan documents. As set forth in *Collier v. Green*, that type of counterclaims do (sic) not change the equitable nature of the foreclosure action." (*Id.* at 8).
4. "Defendants' counterclaims relate directly to the loan documents and the validity of [Plaintiff's] claim that an event of default has occurred. Therefore, the counterclaims do not change the equitable nature of the foreclosure action, and Defendants are not entitled to a jury trial, even if they had not signed express waivers of their right to a jury trial. Therefore, [Plaintiff's] motion to strike Defendants demand for a jury trial is hereby granted." (*Id.* at 9).

Defendants never challenge this ruling by argument or statement of issue. (Init. App. Br., *passim*). They never cite or discuss *Collier*, and it is impossible to challenge the trial court's ruling without doing so. Thus, the trial court's unchallenged ruling is the law of this case and, therefore, this Court "must affirm." *Ex parte Kent*, 666 S.E.2d 921, 925 (S.C.

App. 2008); see also *Burriss v. Propst Lumber & Logging, Inc.*, 719 S.E.2d 695, 700 (S.C. App. 2011); Rule 208(b)(1)(B), SCACR.³¹ In any event, the trial court was correct.

In *Collier*, the debtor asserted affirmative defenses to the foreclosure and opposed any reference to the master based upon his claimed right to a jury trial. *Collier*, 137 S.E.2d at 279. The trial court referred the entire case. The debtor appealed. The Supreme Court affirmed, finding that the debtor was not entitled to a jury trial. *Id.* at 279-281.

Collier involved affirmative defenses rather than counterclaims in a foreclosure action, but any doubt about the applicability of *Collier* to such counterclaims was resolved by the Supreme Court in *Byrn v. Walker*, 267 S.E.2d 601 (S.C. 1980). There, the Supreme Court addressed facts very similar to the present case.

The debtor purchased a home and gave a second mortgage to the seller, who later brought an action to foreclose that mortgage. The debtor counterclaimed for breach of contract and fraudulent representations in the sale of the home. *Byrn*, 267 S.E.2d at 602. The parties consented to a bench trial, so there was no jury trial issue. Nevertheless, the question of whether the debtor's counterclaims were legal rather than equitable remained important, because it affected the standard of review. If legal, appellate review was limited to whether any evidence supported the trial court's ruling. If equitable, the appellate court could take its own view of the evidence. *Id.* at 602. The Supreme Court found that the counterclaims were legal but were nevertheless to be tried as an equitable action:

The [seller's] action was brought to foreclose a real estate mortgage, which is in equity, with *legal actions* interposed defensively by way of *counterclaim* and cross-complaint. Under *Collier* . . . , the action is *to be tried as an equitable action*, since the defenses and counterclaims affect the validity of the lien and the amount due, and arise out of the transaction in which the mortgage was created.

³¹ Challenging the trial court's *Collier* ruling in a reply brief would be futile. Arguments for reversal cannot be made for the first time in a reply brief. *McClurg v. Deaton*, 716 S.E.2d 887, 888 n.2 (S.C. 2011).

Byrn, 267 S.E.2d at 602 (emphasis added) (citation omitted). Accordingly, the Supreme Court treated the entire case as equitable and took its own view of the evidence. *Id.*

Here, as in *Byrn*, Defendants' counterclaims arise out of the Contract between the parties, and challenge the validity of the lien and the amount due, *i.e.*, the validity of foreclosing the lien and the acceleration of the amount due. Accordingly, Defendants are not entitled to a jury trial on their counterclaims, even without the jury waiver, and even if Defendants have challenged the trial court's *Collier* ruling (which they have not).³²

III. Defendants' argument that Judge Lee's prior order precluded Judge Cooper from referring this case to the master is not preserved for appeal and, in any event, Defendants' argument has no merit.

Judge Lee "declined to hear Plaintiff's Motion for Order of Reference pending the resolution of the legal claims asserted in this matter." (Order at 2). Defendants argue that Judge Cooper therefore could not refer the case to the master under the rule that one circuit court judge cannot overrule another. This argument is not preserved and has no merit.

A. Defendants' argument is not preserved for appeal.

An issue cannot be raised for the first time on appeal. *Pye v. Estate of Fox*, 333 S.E.2d 505, 510 (S.C. 2006). Defendants never argued to Judge Cooper that Judge Lee's prior order precluded him referring the case to the master. Thus, Defendants' argument is not preserved for appeal. *Mann v. Walker*, 328 S.E.2d 659, 661 (S.C. App. 1985) (argument that one judge cannot overrule another not preserved because not raised to the trial court).

³² The fact that the parties consented to a bench trial in *Byrn* does not distinguish it from the present case. The right to a jury trial is limited to "legal actions." In *Byrn*, even though the Supreme Court agreed that the debtor's counterclaims were "legal actions," it nevertheless held that the entire case was to be tried as an equitable action. Otherwise, it would have applied the legal standard of review (any evidence) to the debtor's counterclaims. Thus, even if the debtor in *Byrn* had not consented to a bench trial, he nevertheless would not have been entitled to a jury trial, because the entire action was to be tried as an equitable action.

Moreover, Judge Cooper asked if Judge Lee's order was an impediment to the motion to strike Defendants' jury trial demand. (1/13/14 Hrg. Tr. at 21). Plaintiff said it was not and requested a reference to the master if the jury trial demand was stricken. (*Id.* at 22). Defendants said nothing. They did not object to the request for a reference, nor did they argue that Judge Lee's order precluded Judge Cooper from ruling on the requested reference. (*Id.* at 21-26, *passim*).³³ In any event, Defendants' argument has no merit.

B. Defendants' argument has no merit.

As a general rule, one circuit court judge cannot overrule the prior order of another circuit court judge. *Mann v. Walker*, 328 S.E.2d 659, 661 (S.C. App. 1985). This rule does not apply if the subsequent request for relief is based on facts or legal theories not ruled upon in the prior order. *Id.*, *accord Salmonsens 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). As shown below, the issues presented to Judge Lee and Judge Cooper were different, as was the procedural posture of the case. As a result, Judge Lee's order did not preclude Judge Cooper from referring the case to the master.

Judge Lee did not deny or rule upon Plaintiff's motion for reference. Rather, she "*declined to hear* Plaintiff's Motion for Order of Reference *pending* the resolution of the legal claims asserted in this matter." (Judge Lee's Order at 2) (emphasis added). She did not retain jurisdiction over the reference issue. (Judge Lee Order, *passim*).

³³ The colloquy between Judge Cooper and Plaintiff's counsel did not preserve the issue, because an appellant cannot rely on issues raised by another party or mentioned by the judge. *State v. Nichols*, 481 S.E.2d 118, 124 (S.C. 1997) (raised by another party); *Wierszewski v. Tokarick*, 418 S.E.2d 557, 559 n.2 (S.C. App. 1992) (mentioned by judge). Moreover, Judge Cooper did not rule on it (Judge Cooper's Order, *passim*), and Defendants did not file a motion to obtain a ruling. Thus, Defendants' appellate argument is not preserved for appeal. *Cowburn v. Leventis*, 619 S.E.2d 437, 449 (S.C. App. 2005) (if trial court does not rule explicitly, appellant must make motion to obtain ruling or the issue is not preserved for appeal).

Judge Lee’s approach was reasonable under the then-existing procedural posture of the case. The pressing issue at the hearing before her was the appointment of a receiver. (2/1/13 Hrg. Tr. at 4-85). There was no “jury trial waiver” issue before her. That issue had not yet been fully joined between the parties, because Plaintiff had not yet replied to the TIC defendants’ jury trial demand and had not yet filed a motion to strike Defendants’ jury trial demand.³⁴ Thus, at the time of the hearing before Judge Lee (February 1, 2013), and at the time of her order (June 4, 2013), she was faced with an equitable complaint opposed by answers and counterclaims that demanded a trial by jury. Declining to hear the motion for reference was understandable under these circumstances.³⁵

Since Judge Lee was not presented with and did not rule upon the issue of striking Defendants’ jury trial demand, Judge Cooper was free to rule on that issue. Once Judge Cooper struck Defendants’ jury trial demand, the reference issue became a completely different matter, and there was no need to resolve Defendants’ legal claims first. Judge

³⁴ Plaintiff filed its complaint, motion for receiver, and motion for reference in November 2012. (2/1/13 Hrg. Tr. at 5). Fontaine filed its answer and counterclaim (demanding a jury trial), as well as its responses in opposition to the motions for a receiver and a reference, in early December 2012. (*Id.*; Fontaine Answ. at 1). On January 4, 2013, the circuit court issued notice that the motions for a receiver and a reference would be heard on February 1, 2013. (1/4/13 Hearing Notices). On January 7, 2013, Plaintiff filed its reply to Fontaine’s answer and counterclaim, denying that Fontaine had a right to a jury trial, and thereby effecting a joinder of the jury trial issue between Plaintiff and Fontaine. (Reply to Fontaine Answ. at 1; 2, ¶ 2, denying right to jury trial claimed in Fontaine Answ. at 26, ¶ 113(f)). On January 8, 2013, the TIC defendants filed their answer and counterclaim, demanding a jury trial. (TIC Answ. at 1). **After** the February 1, 2013, hearing before Judge Lee, Plaintiff filed its reply to the TIC defendants’ answer and counterclaim on February 14, 2013, asserting the TIC defendants had waived any right to a jury trial, thereby effecting a full joinder of the jury trial issue between Plaintiff and all Defendants. (Reply to TIC Answ. at 1; 13, ¶ 93). **After** Judge Lee’s June 4, 2013 order, Plaintiff filed its motion to strike Defendants’ jury trial demand in August 2013. (Motion to Strike at 1). Judge Cooper heard this motion and granted it in January 2014. (Judge Cooper Order). Defendants never argued that Judge Lee’s order precluded Judge Cooper from referring the case to the master.

³⁵ As Judge Lee explained at the hearing, she understood “*some of the issues are relating to the reference,*” and she recognized that the law required that legal claims in a lawsuit “*have to be taken care of before the equitable matters are taken care of,*” but “*that’s a large question*” and “*we may not need to discuss it at this particular point until there’s been some further resolution on the receiver issue.*” (2/1/13 Tr. at 86) (emphasis added). Judge Lee did not reserve jurisdiction over this “*large question,*” and the jury trial waiver issue was not fully joined until after the hearing before Judge Lee, and it was not presented until after Judge Lee’s order on the “*resolution: of the receiver issue.*” See n.34, *supra*.

Cooper was therefore free to refer the entire case to the master.³⁶ Accordingly, Defendants' argument that Judge Lee's order precluded Judge Cooper's order has no merit.

Finally, Defendant's argument is nonsensical. Absent a reversal on the jury trial issue, this case manifestly must be placed on the non-jury docket where, absent a reference, it would be tried by a circuit court judge without a jury. Under these circumstances, referring the case to the master cannot and does not cause any harm to Defendants because, upon the reference, the master "shall exercise all power and authority which a circuit judge without a jury would have in a similar matter." Rule 53(c), SCRPC.

CONCLUSION

The cornerstone for every counterclaim is Defendants' claim that Plaintiff breached the Contract by violating the contractual standards for increasing the Reserve Account payments. Thus, every counterclaim arises in connection with the Contract and, therefore, Defendants waived any right to a jury on every counterclaim. For this reason, and for all of the reasons argued above, this Court should affirm the appealed order.

Respectfully Submitted,



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³⁶ See Rule 71(a), SCRPC (foreclosure actions "shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53") and Rule 53(b), SCRPC (in a foreclosure action, "some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge" unless there is a right to a jury trial on any or all issues); see also *Blackburn*, 755 S.E.2d at 441-442 (equitable and legal claims may be tried together in a single trial without a jury if there is a valid jury trial waiver).