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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

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NOV 19 2015

SC Court of Appeals

Appellate Case No. 2014-000377

DRV FONTAINE, LLC, ..... Respondent,

v.

FONTAINE BUSINESS PARK, LLC, FONTAINE BUSINESS PARK 2, LLC,  
FONTAINE BUSINESS PARK 3, LLC, FONTAINE BUSINESS PARK 4, LLC,  
FONTAINE BUSINESS PARK 5, LLC, FONTAINE BUSINESS PARK 6, LLC,  
FONTAINE BUSINESS PARK 7, LLC, FONTAINE BUSINESS PARK 8, LLC,  
FONTAINE BUSINESS PARK 9, LLC, FONTAINE BUSINESS PARK 10, LLC,  
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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.

**PETITION FOR REHEARING**

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Pursuant to Rules 221 and 240, SCACR, Appellants petition this Court to Rehear and Reconsider its ruling in the above-captioned matter. Appellants assert this Court overlooked or misapprehended the following points in affirming the Order below in this matter:

**I. The issue of whether or not the Issue pertaining to the Order of Reference was preserved for review is irrelevant. The law is clear that issues dealing with subject matter jurisdiction are not waivable and may be raised at any time.**

An order from one circuit judge is the law of the case and cannot be reversed by another circuit judge. Here, Judge Lee first ordered that the Plaintiff Investor's Motion for an Order of Reference would be deferred until the legal issues in the case were adjudicated. Accordingly, Judge Cooper's subsequent Order of Reference is legally void and must be reversed.

One circuit judge has no power to review, revise, or reverse the decision of another circuit judge of the same court upon the same facts. *Ex parte State*, 263 S.C. 363, 210 S.E.2d 600, 601-602 (1974); *Cook v. Taylor*, 272 S.C. 536, 252 S.E.2d 923 (1979); *Department of Social Services v. Laura D.*, 386 S.C. 382, 688 S.E.2d 130 (2009). The ruling of the first judge is binding on all parties and, when left unappealed, becomes the law of the case. *Ex parte State*, at 601; see also *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 603, 340 S.E.2d 546, 547 (1986) (finding a circuit court judge cannot deny the use of an amended complaint in light of an order of another circuit court judge that permitted use of the amended complaint); see *Eldridge v. Eldridge*, 398 S.C. 113, 728 S.E.2d 24 (2012); *Richland County v. Palmetto Cablevision*, 261 S.C. 222, 199 S.E.2d 168 (1973) (stating an unchallenged ruling, right or wrong, is the law of the case).

Here, the Investor's Motion for Order of Reference was heard by Judge Alison Lee on February 1, 2013, and taken under advisement. (R. 733, *Notice of Motion Scheduling*, MORDRE, Jan. 4, 2013; R. 782-783, *Motion Trans.*, pp. 22-23). In the Order Appointing Receiver, Judge

Lee ruled: "The Court declined to hear Plaintiff's Motion for Order of Reference pending the resolution of the legal claims asserted in this matter" (R. 2, *Order Appt. Rec.*, p. 2). That aspect of Judge Lee's decision has not been challenged by any party. The case of *Cook v. Taylor*, 272 S.C. 536, 252 S.E.2d 923 (1979) is directly on point. There, the South Carolina Supreme Court explained:

. . . the defendant's attorney procured from Circuit Judge Klyde Robinson an order of reference to the master in equity. Upon learning of the order, counsel for the plaintiff moved before Circuit Judge Paul M. Moore to set aside the order of reference, ". . . on the ground that there are legitimate issues for determination by a jury." The motion came to be heard before Judge Moore, resulting in his order vacating the order of Judge Robinson; he then directed that the case be placed on the jury docket for trial.

*Cook v. Taylor*, 272 S.C. 536, 537, 252 S.E.2d 923, 924 (1979). On those facts, the Supreme Court held:

The order of Judge Moore amounted to a review by him of the order of another circuit judge (Judge Robinson) and a reversal of the order of Judge Robinson because Judge Moore disagreed as to the proper mode of trial. Judge Moore did not have the power to set aside the order of his predecessor *Id.* at 538, 252 S.E.2d at 924. Accordingly, the Supreme Court set aside Judge Moore's order. *Id.* This Court should do the same with Judge Cooper's Order of Reference, which effectively set aside Judge Lee's Order.

Moreover, only the Investor's Motion to Strike Jury Demand was actually heard by Judge G. Thomas Cooper, Jr. (R. 604, *Notice of Motion Scheduling*, MSTRICK, Dec. 18, 2013; R. 734, MSTRICK *Trans.*, Jan. 13, 2014). Appellants received no notice that the motion for an Order of Reference, which was previously heard and under advisement by Judge Lee, would be heard by Judge Cooper. Although the Motion for Order of Reference was not before Judge Cooper, in granting the Investor's Motion to Strike, Judge Cooper further ordered that "the case should be

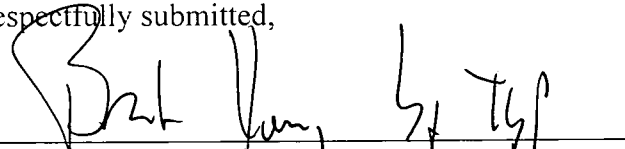
referred to the Master-in-Equity for Richland County pursuant to Rules 71 and 53, SCRCP" (R. 20, *Order Granting Motion to Strike*, p. 9). Because Judge Lee had already ruled that Investor's Motion for Order of Reference would not be heard until the legal issues in the case were first resolved, Judge Cooper's order amounts to a review of the order of another circuit judge and improper reversal of that order. Moreover, the failure of any notice that the Motion for the Order of Reference would be decided by Judge Cooper is a violation of fundamental due process rights and thereby renders Judge Cooper's Order void under South Carolina law. *Linda Mc Co. v. Shore*, 390 S.C. 543, 703 S.E.2d 499, 552 (S.C. 2010)(Ruling that judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction, are void under our Rules). If an order is void, it can be attacked at any time, even for the first time on appeal. *See Thornton v. Alford*, 274 S.C. 1, 260 S.E.2d 179 (1979); *Turner v. Malone*, 24 S.C. 398 (1886)(holding a judgment or order entered without jurisdiction is void *ab initio*); *see also Webster v. Clanton*, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972) (explaining that an order issued without jurisdiction is void and a void order has no legal effect); *cf Ex parte Reichlyn*, 310 S.C. 495, 499, 427 S.E.2d 661, 663 (1993) (holding judgment entered in violation of the automatic stay in a bankruptcy proceeding is void because the court lacks subject matter jurisdiction to take any action inconsistent with the stay); *Li v. Rizzio*, 801 N.W.2d 351(Iowa Ct. App. 2011)(" a void judgment may be attacked at anytime"); *Nelson v. Warden of the Keen Mt. Corr. Ctr.*, 262 Va. 276, 552 S.E.2d 73, 2001 Va. LEXIS 94 (Va. 2001) "However, if the error causes a judgment to be void, that is, a nullity, the failure to preserve that error in the trial court or upon appeal does not and cannot cause the judgment to be merely voidable. Rather, the void judgment may be challenged 'at any time, in any manner, before any

court, or by the court itself.” Citing *Humphreys v. Commonwealth*, 186 Va. 765, 772, 43 S.E.2d 890, 893 (1947).

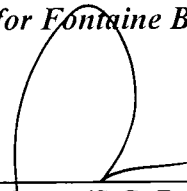
This Court did not consider or address the issue of whether Judge Cooper’s Order was void for lack of subject matter jurisdiction or for failure to provide due process to Appellants. If either argument of Appellant is valid, then there was no requirement that the issue be preserved on appeal. Moreover, it is impossible to raise an objection to the judge considering an issue when no notice is given to the party that the issue was even before the Court. Therefore, Appellants are entitled to a rehearing and reversal of Judge Cooper’s Order with regard to the Order of Reference.

Date: November 19, 2015.

Respectfully submitted,



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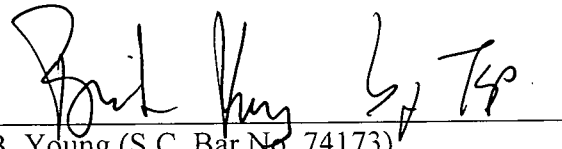
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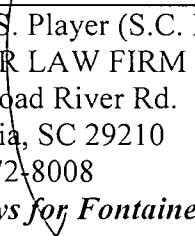
**CERTIFICATE OF COUNSEL**

The undersigned certify that this Petition for Rehearing complies with Rule 240, SCACR.

This 19<sup>th</sup> day of November 2015.



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**PROOF OF SERVICE**

We certify that a copy of the Petition for Rehearing was served on counsel for Appellee on  
November 19, 2015, by U.S. Mail, postage prepaid, addressed to Paul Widener, P.O. Box 11390,  
Columbia, S.C. 29211.

This 19<sup>th</sup> day of November, 2015.

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